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Defamation, the Private Individual, and Matters of Public Concern: A Proposed Resolution for Florida

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DEFAMATION, THE PRIVATE INDIVIDUAL AND MATTERS OF PUBLIC CONCERN: A PROPOSED RESOLUTION FOR FLORIDA*

INTRODUCTION

Contemporary media publications are the major source of news dissemination in American society.[1] The information they provide or withhold affects the daily decisions and attitudes of the public.[2] The limits of the media's freedom and responsibility must be evaluated, however, against the possibility a publication may invade the sanctity of an individual's reputation.

Prior to 1964[3] the law of defamation[4] was governed by the common law of the several states.[5] Early common law subjected the defamer to strict liability,[6]

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1. The primary purpose for the constitutional protection of a free press is to have a fourth governmental institution to check the three official branches of government. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

2. The right of the press to decide what to publish distinguishes the United States not only from totalitarian nations, but also from nations like Great Britain which impose significant restraints on the material the media may publish. Address by Mr. Justice Stevens, the University of Arizona College of Law Dedication Ceremony (September 8, 1979), *reprinted in* COMMUNICATIONS LAW 1979 105 (Practicing Law Institute).

3. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (developed first amendment protection for certain defamation actions brought against the media).

4. Defamation, both libel and slander, may be defined as the unprivileged publication of false statements which naturally and proximately result in injury to another. Cooper v. Miami Herald Publ. Co., 159 Fla. 296, 299-300, 31 So. 2d 382, 384 (1947). Early common law distinguished libel (written statements) from slander (oral statements) because libel, at that time, had a greater potential for widespread dissemination due to undeveloped broadcasting technology. Commander v. Pedersen, 116 Fla. 148, 157, 156 So. 337, 339 (1934). This distinction is no longer recognized today because there is equal potential for mass publication of both written and oral statements. Teare v. Local Union No. 295, United Ass'n of Journeymen, 98 So. 2d 79, 82 (Fla. 1957); Campbell v. Jacksonville Kennel Club, 66 So. 2d 495, 497 (Fla. 1953). It should be noted that the first amendment, adopted in 1791, does not distinguish between freedom of speech and press. See U.S. CONST. amend. I.

5. Defamation, like obscenity and fighting words, received no first amendment protection due to the belief that this type of speech had minimal social value. *See generally* Roth v. United States, 354 U.S. 476, 482 (1957) (noting that although ten of the fourteen states ratifying the Constitution embodied free expression guarantees in their respective constitutions, thirteen of those states had provisions for the prosecution of libel); Beauharnais v. Illinois, 343 U.S. 250, 254-55 (1952) (when the Constitution was adopted there was no suggestion that the crime of libel should be abolished); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (the social benefits derived through the prevention and punishment of obscenity, libel and fighting words outweigh any benefits that such speech may provide); Near v. Minnesota, 283 U.S. 697, 715 (1931) (the Constitution does not abolish common law punishment of the libeler); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (the Constitution's protection of speech and press does not prevent subsequent punishment of that which is contrary to the public welfare).

6. *See* RESTATEMENT OF TORTS §578 (1938). For examples of leading early common law cases applying the doctrine of strict liability, *see, e.g.*, Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331 (good faith publication that plaintiff's husband was engaged to another woman); Morrison v. Ritchie, (1904) 4 Fraser (4 Sess. Cas.) 645, 39 Scot. L. Rep. 432 (good faith report that plaintiff gave birth to twins); Hulton v. Jones [1910] A.C. 20

unless the publisher affirmatively proved that the statements were either true[7] or privileged.[8] The defendant was liable regardless of intent, recklessness or negligence, if he published a statement to a third party that could reasonably be construed[9] as defaming the plaintiff.

The burdensome, often unrebuttable, presumptions[10] placed on the defendant in a defamation suit applied to both the gossiping neighbor and the event-reporting local newspaper. The press' power to damage those whom it disfavored and enhance those whom it favored was greatly feared.[11] The courts promulgated strict rules of law to redress the harm to reputation caused by defamatory falsehoods. Notably, early local newspaper reporting was naturally restricted to a relatively confined area because of limited technology and transportation. Accordingly, investigative and editorial control were relatively easy to implement.[12] However, as early as 1933 the Florida supreme court realized that reformation of the common law strict liability doctrine was warranted to accommodate the complexities of a mechanized era.[13] The court

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(apparently fictitious name corresponded to plaintiff's). The doctrine of strict liability often led cautious publishers to decide not to publish to avoid the expense of defending against strict liability. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). *See generally* W. PROSSER, HANDBOOK ON THE LAW OF TORTS 737-801 (4th ed. 1971); *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 938-45 (1956).

7. The Florida Constitution of 1885 stated that truth, coupled with good motives, was a complete defense to criminal or civil libel actions. FLA. CONST. art. I, §13 (1885) (current version at FLA. CONST. art. I, §4 (1968); adopted the 1885 provision with minor word changes). *But cf.* Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (when a federal constitutional privilege is involved, truth is a complete defense, regardless of motive).

8. See notes 26-29 and accompanying text, *infra*.

9. The language was interpreted as the "common mind" would naturally construe it. The jury was instructed to construe the words in view of what they thought they were intended to convey. McCellan v. L'Engle, 74 Fla. 581, 583, 77 So. 270, 271 (1917). However, a demurrer, summary judgment or directed verdict could be granted if the judge determined that the words could not possibly convey a defamatory meaning. Cooper v. Miami Herald Publ. Co., 159 Fla. 296, 300, 31 So. 2d 382, 384 (1947).

10. RESTATEMENT OF TORTS §580 (1938). The procedural rules of evidence placed defamation in two categories—actionable per se and actionable per quod. If the words were defamatory without resort to extrinsic evidence, or per se, then general damages and malice were presumed as a matter of law. Conversely, if the defamatory characteristic of the statement depended on the introduction of extrinsic evidence, the suit was labeled actionable per quod. The plaintiff in a per quod suit was required to alledge and prove special damages and express malice. Layne v. Tribune Co., 108 Fla. 177, 181-82, 146 So. 234, 236 (1933). General damages compensate loss resulting from injured feelings, humiliation, anguish and mental suffering. Miami Herald Publ. Co. v. Brown, 66 So. 2d 679, 680-81 (Fla. 1953). Special damages are proven by actual pecuniary loss. Wolkowsky v. Garfunkel, 65 Fla. 10, 11, 60 So. 791, 791 (1913). Historically, slander per se only included words imputing a felony to the plaintiff, Commander v. Pedersen, 116 Fla. 148, 154, 156 So. 337, 339 (1934), whereas libel per se included statements that charged the plaintiff with a felony, a venereal disease, conduct incompatible with the plaintiff's trade or business, or the unchastity of a woman, Loeb v. Geronemus, 66 So. 2d 241, 244-45 (Fla. 1953). Slander per se was expanded to include all four categories in Campbell v. Jacksonville Kennel Club, 66 So. 2d 495, 497 (Fla. 1953).

11. Layne v. Tribune Co., 108 Fla. 177, 187, 146 So. 234, 239 (1933).

12. *Id.*

13. *Id.* at 185, 146 So. at 237.

concluded that when a media defendant was involved the reputation of the individual was not the only interest that merited protection.[14]

Modern defamation law involves state and federal[15] determinations of when an individual's interest[16] in his reputation entitles him to compensation for its degradation, and when that interest must yield to the first amendment protection of uninhibited news dissemination.[17] This balancing process[18] ultimately defines the substantive and procedural rules which govern particular defamation suits.[19] The 1974 United States Supreme Court decision of *Gertz v. Robert Welch, Inc.*[20] left undefined a standard of fault for defamation litigation involving non-public figures.[21] Fault must be the basis for liability,

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14. *Id.*

15. The body of law developed at both the state and federal levels includes constitutional, statutory and case law. Case law encompasses many refinements on the subject of defamation. For illustrations of constitutional and statutory materials, *see, e.g.*, U.S. CONST. amend. I; FLA. CONST. art. I, §4; FLA. STAT. §§770.01-.08 (1979).

16. At least one Justice has argued that the protection of reputation from invasion and wrongful hurt is a "private personality" *right* left primarily to the states under the ninth and tenth amendments. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

17. The first amendment is applicable to the states via the fourteenth amendment. Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

18. One commentator states that the law of defamation is not merely a balancing of reputational interests against media self-censorship. Rather, libel law is the method by which the courts seek to control the press' power; a satisfactory means of influencing journalistic decisions will not be found until the courts admit their goal. *See* Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271, 284 (1976). *But cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974) (there must be an appropriate accommodation between defamation law and the freedom of speech and press); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 49-50 (1971) (the protection of an individual's reputation must often yield to the vital need for a free press); Curtis Publ. Co. v. Butts, 388 U.S. 130, 147 (1967) (an accommodation must be found for the competing interests in all libel actions); Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (acknowledging the tension between the first amendment and society's interest in redressing attacks on reputation); New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (whether articles on a major issue forfeit constitutional protection due to their falsity and alleged defamatory character); Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972) (seeking to constitutionally balance the rights of each party to a defamation suit), *rev'd on other grounds per curiam*, 305 So. 2d 172 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976); Miami Herald Publ. Co. v. Brautigan, 127 So. 2d 718, 722 (Fla. 3d D.C.A.) (precise analysis is required when freedom of expression collides with the individual's protection of a good reputation), *cert. denied*, 369 U.S. 821 (1961). *See also* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 204-06 (1976) (analysis of the defamation decisions must focus on the Court's skill in balancing reputation and first amendment values).

19. The substantive and procedural rules include a determination of which standard of proof will be required: clear and convincing evidence or preponderance of the evidence; which standard of intent will be applied to the publisher's actions: actual malice or negligence; and which party will have the burden of proving the truth or falsity of the publication. Furthermore, statutes may require notice to the publisher alleging the false and defamatory statements as a condition precedent to instituting a defamation suit, as well as the preclusion of punitive damages if a retraction is published. *See, e.g.*, FLA. STAT. §770.01-.02 (1979).

20. 418 U.S. 323 (1974). See text accompanying notes 118-127 *infra*.

21. The term "non-public" (private) figure has not been clearly defined by the courts. But since "public officials" and "public figures" have been defined, these definitions can

but the states were free to impose a standard of fault which best accommodated the competing interest involved.[22] Florida has not developed such a fault standard, resulting in confusion and speculation among the bench, bar and commentators.[23]

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be juxtaposed with the facts of a case to determine the plaintiff's status. The term "public official" is defined as "those among the hierarchy of governmental employees who have, or appear to have, substantial responsibility for, or control over, the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279 (1971) (deputy chief of detectives); Rosenblatt v. Baer, 383 U.S. 75 (1966) (former supervisor of county's recreational area); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); Garrison v. Louisiana, 379 U.S. 64 (1964) (group of parish judges); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (elected city commissioner). Public figures may be those deemed public figures for all purposes because they "occupy positions of persuasive power and influence," Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), or those whose "purposeful activity amount[s] to a thrusting of [their] personality into the 'vortex' of an important public controversy." Curtis Publ. Co. v. Butts, 388 U.S. 130, 155 (1967). *See, e.g.*, Greenbelt Coop. Publ. Ass'n v. Bresler, 398 U.S. 6 (1970) (real estate developer seeking zoning change); Walker v. Associated Press, 388 U.S. 130 (1967) (retired army general who assumed a leadership role in a racial demonstration); Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967) (well-known university football coach). *See generally* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 275-90 (the Court's definition of public figures is a result of the sequence in which the Court received the cases); Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1551-56 (1972) (reviewing the Court's public figure cases as a "logical consequence" of *New York Times*).

22. 418 U.S. at 347.

23. Florida courts have attempted to delineate a post-*Gertz* stance but have not been successful. The United States Supreme Court reversed the Florida supreme court's attempt because it failed to enunciate what standard of fault would be applied in Florida subsequent to *Gertz*. Firestone v. Time, Inc., 305 So. 2d 172 (Fla. 1976) (per curiam), *rev'd*, 424 U.S. 448 (1976). In Karp v. Miami Herald Publ. Co., 359 So. 2d 580 (Fla. 3d D.C.A. 1978) (per curiam), the parties agreed to the trial judge's determination that negligence was the standard of fault for private plaintiffs. However, the trial court adopted this negligence standard in reliance on the Florida supreme court's opinion in *Firestone*. This reliance was erroneous since the United States Supreme Court had reversed *Firestone*. See also note 129 *infra*. Another district court of appeal stated that under *Gertz*, private plaintiffs no longer need prove actual malice. Helton v. United Press Int'l, 303 So. 2d 650, 651 (Fla. 1st D.C.A. 1974). However, the court did not state which standard of fault would apply to such defamation actions. *Id.* at 651. The only other district court of appeal opinion addressing this issue involved a public figure libel action. The court summarily noted that defamation suits were governed by a dual standard—one for public figures and another for private individuals. However, this court also neglected to articulate what standard applied to private defamation suits. Finkel v. Sun Tattler Co., 348 So. 2d 51, 52 (Fla. 4th D.C.A. 1977) (per curiam), *cert. denied*, 358 So. 2d 135 (Fla. 1978).

The current version of FLA. STD. JURY INSTR. (CIV.) (1978) utilizes a negligence standard for defamation claims by non-public figures against news media defendants. FLA. STD. JURY INSTR. (CIV.) MI 4.3 at 1 (1978). The committee comments state that "[u]ntil there is an authoritative Florida decision to the contrary, the committee *assumes* that Florida law requires proof of negligence in such a case." (emphasis added). *Id.* at 2 n.1 (Notes on Use). This assumption cannot be read as a mandate for Florida's post-*Gertz* standard of liability in defamation actions brought by private plaintiffs because it is not based on Florida case law.

Compare 1 COMMUNICATIONS LAW 1977 34 (Practicing Law Institute) (relying on Helton

This note will focus on developing an appropriate standard of fault for defamation litigation in Florida involving non-public figures and media defendants.[24] Two analyses are used to ascertain the standard of fault that would be most suitable for Florida defamation suits filed by private plaintiffs involved in matters of public concern. One is a historical analysis of Florida and federal judicial development of the media's qualified privileges. At the state and federal levels, each of the gradual extensions of the media privileges has placed primary emphasis on the protection of "matters of public or general interest."[25] This note will argue that media publications continue to deserve a standard of fault commensurate with the significant function they serve in a free, informed society, regardless of the plaintiff's status. The second analysis focuses on the rationales of states which have adopted the two principal standards of fault, actual malice and negligence. A comparison of the policies and other justifications expressed by these two groups of states with the doctrines formerly adopted in Florida reveals that the actual malice standard states capture the philosophy exhibited in Florida law.

THE METAMORPHOSIS OF A QUALIFIED TO PUBLISH MATTERS OF PUBLIC INTEREST OR CONCERN

Mitigation of the harsh strict liability doctrine was accomplished through the mechanisms of absolute[26] and qualified privileges. A qualified privilege

v. United Press Int'l, 303 So. 2d 650 (Fla. 1st D.C.A. 1974), Florida's post-*Gertz* position was classified as "undecided" with a tendency to adopt a standard less than actual malice) *with* COMMUNICATIONS LAW 1979 247 (Practicing Law Institute) (Florida was reclassified as a simple negligence state relying on *Firestone*, 305 So. 2d 172 (1976) (per curiam), *rev'd*, 424 U.S. 448 (1976) and Karp v. Miami Herald Publ. Co., 359 So. 2d 580 (Fla. 3d D.C.A. 1978) (per curiam)).

24. The term "media" means any means of mass communications including, but not limited to, newspapers, magazines, television and radio broadcasting. Thus, media defendants include the publication or broadcast itself as well as its publishers, editors, reporters, newscasters and broadcasters. Hereinafter, the terms publication[s], publisher[s] and published will refer to both written and oral communications.

25. The phrase "matters of public or general concern" first appeared in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 192, 214 (1890). See note 39 *infra* for illustrations of the courts' consistent use of this phrase throughout the development of the media's qualified privilege. *But cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (actual malice standard for matters of public concern no longer mandated).

26. If an absolute privilege were deemed to exist, then neither bad faith nor falsity would serve to nullify it. Coogler v. Rhodes, 38 Fla. 240, 245, 21 So. 109, 112 (1897). Absolute privileges have been extended to legislative and judicial proceedings to promote uninhibited participation in such proceedings. The absolute privilege in judicial proceedings extends to the judge, parties, counsel and witnesses. State v. Tillett, 111 So. 2d 716 (Fla. 2d D.C.A. 1959) (judicial proceedings include grand jury proceedings). The only limitation is the statement's relevance to the subject matter of the proceedings. If it is not relevant, then only a qualified privilege is applied. Myers v. Hodges, 53 Fla. 197, 212, 44 So. 357, 362 (1907). *See, e.g.*, Taylor v. Aleopa Corp., 138 Fla. 137, 189 So. 230 (1939) (words appearing in pleadings are absolutely privileged if relevant to the proceeding); Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927) (absolute privilege applies to reports of commissioners and other functionaries who are required by the court to examine persons and things); Sussman v. Damiam, 355 So. 2d 809 (Fla. 3d D.C.A. 1977) (attorney absolutely privileged to utter relevant defamatory statements while taking depositions or conversing with opposing counsel); *cf.*

arises when the speaker and receiver of the statement have a mutual interest in the subject matter.[27] Qualified privileges are recognized when societal interest deems it proper for a person to communicate certain facts to a third party.[28] Significantly, the existence of a qualified privilege shifts the burden of proving express malice to the plaintiff.[29] In contrast with actionable per

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Barr v. Matteo, 360 U.S. 564, 575 (1959) (federal officers absolutely privileged to make defamatory statements within the "outer perimeters" of their duties); *see also* FLA. STAT. §443.16(3) (1979) (statements from employer or employee to each other or to the Florida Industrial Commission regarding the requirements of the unemployment compensation law are absolutely privileged); McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966) (letter from county manager to county commission stating why plaintiff was dismissed from office of sheriff is absolutely privileged); Cripe v. Board of Regents, 358 So. 2d 244 (Fla. 1st D.C.A. 1978) (absolute privilege for defamatory statements contained in required employee evaluations by department director at state university). *But see* Merriman v. Lewis, 141 Fla. 832, 194 So. 349 (1940) (defamatory statements by insured to insurer about insured's employee for the purpose of collecting a claim, with the intent of enforcing the claim in court, if necessary, is not absolutely privileged).

27. Leonard v. Wilson, 150 Fla. 503, 508, 8 So. 2d 12, 14 (1942). One category of qualified privileges is statements made in connection with various volunteer organizations, lodges, societies and labor unions. *See, e.g.*, Loeb v. Geronemus, 66 So. 2d 241 (Fla. 1953) (defamatory statements about a congregant made at a religious group meeting); Frieder v. Prince, 308 So. 2d 132 (Fla. 3d D.C.A. 1975) (notice to members of opticians' association explaining the insufficiency of evidence to remove plaintiff from board of directors). A second category includes communications between an agent and his principal. *See, e.g.*, Appell v. Dickinson, 73 So. 2d 824 (Fla. 1954) (communication by corporate president to employed broker concerning broker's employee); Leonard v. Wilson, 150 Fla. 503, 8 So. 2d 12 (1942) (medical report of a required physical examination of an employee). Credit reports compose a third category. *See, e.g.*, Caldwell v. Personal Fin. Co., 46 So. 2d 726 (Fla. 1950) (defamer's statement to credit company upon inquiry invited by debtor is qualifiedly privileged unless defamer knew it was false); Putnal v. Inman, 76 Fla. 553, 80 So. 316 (1918) (merchants' association can publish to its members the names of persons with delinquent accounts). Another category includes character reference reports by former employees. *See, e.g.*, Briggs v. Brown, 55 Fla. 417, 46 So. 325 (1908) (letter from corporate officer regarding the actions of a former corporate treasurer to indemnity company that had given a surety bond); Abraham v. Baldwin, 52 Fla. 151, 42 So. 591 (1906) (statement by former employer to present employer concerning employee's past conduct). Publications about judicial proceedings are also qualifiedly privileged but only if they are accurate and impartial. *See, e.g.*, Walsh v. Miami Herald Publ. Co., 80 So. 2d 669 (Fla. 1955) (newspaper article about the testimony of a police officer is not qualifiedly privileged unless it is accurate); Shiell v. Metropolis Co., 102 Fla. 794, 136 So. 537 (1931) (although publications about judicial proceedings are privileged, a particular publication is privileged only if it is fair, accurate and impartial).

28. Coogler v. Rhodes, 38 Fla. 240, 245, 21 So. 109, 112 (1896). The speaker need not have spoken under the compulsion of a positive legal duty. A social or moral duty to speak is sufficient to initiate a qualified privilege. Leonard v. Wilson, 150 Fla. 503, 508, 8 So. 2d 12, 14 (1942).

29. Express malice must be distinguished from the constitutional law term "actual malice." The term "express malice" connotes falsity and "intent to injure." Abram v. Odham, 89 So. 2d 334, 336 (Fla. 1956), whereas the term "actual malice" refers to the publisher's "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). At common law, express malice focused on the defendant's attitude towards the plaintiff, while actual malice focused on the defendant's attitude toward the truth or falsity of the material published. Cantrell v. Forest City Publ. Co., 419 U.S. 245, 251-52 (1974).

se[30] defamation suits, malice is presumed not to exist when a qualified privilege is applicable.[31]

Consequently, a qualified privilege for the media to publish matters of public interest or concern began to develop. The pinnacle of this gradual evolution was the adoption, by both the Florida and United States Supreme Courts,[32] of an actual malice standard of fault to accompany this privilege.[33] This privilege developed in three stages. The first stage encompassed judicial recognition of the unique role of the media in a free society, and accordingly, the need to extend sufficient breathing space[34] to foster their fulfillment of this role.[35] The second stage involved circumscription of the individual's private sphere.[36] The dissemination of information on matters of public concern was determined to justify the occasional exposure of even those persons who desired anonymity.[37] These two stages culminated in the third stage, the ratification of a qualified privilege to publish matters of public concern while protected by an actual malice standard of fault.[38]

30. See note 10 *supra.*

31. Coogler v. Rhodes, 38 Fla. 240, 245, 21 So. 109, 112 (1896). Although malice can be inferred from the language itself or through extrinsic evidence, the mere fact of falsity will not satisfy the plaintiff's affirmative burden of proving malice. *Id. Accord,* Gibson v. Maloney, 231 So. 2d 823, 825 (Fla. 1970), *cert. denied,* 410 U.S. 484 (1973); Abram v. Odham, 89 So. 2d 334, 336 (Fla. 1956); *cf.* St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (the defense of truth is not sufficient protection against self-censorship nor does it adequately implement first amendment policies); Curtis Publ. Co. v. Butts, 388 U.S. 130, 152 (1967) (if the publication concerns a matter of great public interest, then falsity will not dissipate the publisher's constitutional protections); New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (factual error will not remove the constitutional privilege to criticize public officials). However, a qualified privilege may be lost by the manner of its exercise. McClellan v. L'Engle, 74 Fla. 581, 583, 77 So. 270, 272 (1917).

32. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970), *cert. denied,* 410 U.S. 984 (1973). See notes 89-117 and accompanying text, *infra.*

33. See note 29 *supra,* for the distinction between express and implied malice. Appropriately, emphasis has shifted from the publisher's attitude about the plaintiff, that is, express malice, to his attitude about the publication, actual malice. A publisher's responsibility for rapid dissemination of world-wide news necessarily precludes the existence of a personal relationship, and thus hostility, between the publisher and the actors involved. Accordingly, emphasis is placed on the journalistic procedures of the publisher and his employees.

34. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964), *quoting* Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942), *cert. denied,* 317 U.S. 678 (1943).

35. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Ross v. Gore, 48 So. 2d 412 (Fla. 1950); Cooper v. Miami Herald Publ. Co., 159 Fla. 296, 31 So. 2d 382 (1947); Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933). See notes 41-63 and accompanying text, *infra.*

36. *See, e.g.,* Associated Press v. Walker, 388 U.S. 130 (1967); White v. Fletcher, 90 So. 2d 129 (Fla. 1956); Abram v. Odham, 89 So. 2d 334 (Fla. 1956). See notes 64-77 and accompanying text, *infra.*

37. *See, e.g.,* Time, Inc. v. Hill, 385 U.S. 374 (1967); Jacova v. Southern Radio & Television Co., 83 So. 2d 34 (Fla. 1955). See notes 79-85 and accompanying text, *infra.*

38. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970), *cert. denied,* 410 U.S. 984 (1973). *But cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (actual malice standard not mandated for private individuals involved in matters of public interest). See notes 86-117 and accompanying text, *infra.*

This metamorphosis exhibited two consistent and significant features. First, each stage involved a subject matter focus—matters of public concern or interest.[39] Second, the Florida courts promulgated these developments prior to the United States Supreme Court's similar adoption.[40]

Stage One: A Free Press Needs Adequate Breathing Space

Responding to the technological advances in the communications and transportation industries of the 1930s and 1940s, the Florida courts recognized the local daily newspaper's added responsibility of supplying world-wide news coverage to its readers.[41] Accordingly, the Florida supreme court extended a

39. *See, e.g.*, Curtis Publ. Co. v. Butts, 388 U.S. 130, 149 (1974) (the dissemination of information on "matters of public interest" is an "inalienable right"); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30-31 (1971) (the common factor in *New York Times* and its progeny is a defamatory publication about an event of "public or general interest); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (the opening of a new play was "a matter of public interest," therefore, recovery must be based on proof of actual malice); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (the first amendment secures freedom of expression upon public questions); Firestone v. Time, Inc., 271 So. 2d 745, 749 (Fla. 1972) (media publications about "matters of public or general interest" are constitutionally protected even if they relate to private individuals), *rev'd on other grounds per curiam*, 305 So. 2d 172 (Fla. 1974), *rev'd* 424 U.S. 448 (1976); Gibson v. Maloney, 231 So. 2d 823, 826 (Fla. 1970) ("fair comment" on "public matters" is protected by an actual malice standard), *cert. denied*, 398 U.S. 951 (1973); Abram v. Odham, 89 So. 2d 334, 336 (Fla. 1956) (the media's qualified privilege to "publish matters of great public interest" can be triggered by injecting oneself into the matter); Jacova v. Southern Radio & Television Co., 83 So. 2d 34, 37 (Fla. 1955) (the media has qualified privilege to telecast one who is at the scene of an "occurrence of public or general interest"); Cooper v. Miami Herald Publ. Co., 159 Fla. 296, 301, 31 So. 2d 382, 384 (1947) (media publications reflecting an "incident of public interest" are not actionable without proof of malice).

40. *Compare* Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950) (occasional errors by the newspapers must be tolerated to preserve American democracy which depends on the public receiving rapid information) *with* New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (erroneous statements by newspapers are inevitable and must be protected in order to give freedom of expression the "breathing space" it needs to survive. *Compare* State *ex rel.* Arnold v. Chase, 94 Fla. 1071, 1073, 114 So. 856, 857 (1927) (candidate for public office puts his character in issue to the extent it affects his fitness and qualifications for office) *with* Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971) (public discussion about the qualifications of a public official or candidate is constitutionally protected). *Compare* Abram v. Odham, 89 So. 334, 336 (Fla. 1956) (qualified privilege to comment on one who "injects" himself into a matter of public interest) *with* Associated Press v. Walker, 388 U.S. 130, 155 (1967) (constitutional protection of publication concerning persons who "thrust" themselves into the "vortex" of an important public controversy). *Compare* Jacova v. Southern Radio & Television Co., 83 So. 2d 34, 36 (Fla. 1955) (one emerges from his seclusion when he becomes an actor, voluntarily or not, in an event of public interest) *with* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (exposure of one's self to others is an inevitable part of life in a civilized society). *Compare* Gibson v. Maloney, 231 So. 2d 823, 826 (Fla. 1970) (actual malice standard applies to "fair comment" on matters of public interest), *cert. denied*, 410 U.S. 984 (1973) *with* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (actual malice standard for matters of public or general interest).

41. *See, e.g.*, Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950) (to preserve rapid, free news dissemination, no unreasonable restraints should be placed on publication of the thousands of daily news articles on pending matters); Cooper v. Miami Herald Publ. Co., 159 Fla. 296,

qualified privilege to publications reporting incidents of public interest. Absent affirmative proof of express malice or abuse of this qualified privilege, falsity would not subject the media to liability for these publications.[42]

Pursuant to this emerging policy, the Florida legislature promulgated civil and criminal defamation statutes aimed at mitigating the burdens on the publishing industry.[43] A condition precedent to filing a civil or criminal action against a publisher was the service of prior written notice specifying the alleged defamatory, false statements.[44] Failure to give specific notice resulted in a summary verdict for the defendant-publisher.[45] Further, if the publication was determined to have been made in good faith and a retraction, correction

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301, 31 So. 2d 382, 384 (1947) (consideration must be given to the daily newspaper's responsibility for supplying news and information from the remote corners of the world); Layne v. Tribune Co., 108 Fla. 177, 183-85, 146 So. 234, 237-39 (1933) (judicial notice requires recognition that early common law did not take into account the modern institution of news dissemination).

42. In Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933), a local newspaper reproduced a wire service article about the indictment of a state representative and his secretary for the possession of whiskey. The article failed to state that the indictment had been dismissed. Affirming the judgment for the newspaper, the Florida supreme court spoke extensively about the need to create new defamation doctrines to deal with the complexities of the modern daily newspaper. *Id.* at 183-85, 146 So. at 237-39. The court rejected the common law concept of presumed malice, replacing it with an affirmative requirement of proof of malice in fact. *Id.* at 188-89, 146 So. at 239. This new doctrine was extended to locally originating news items in Cooper v. Miami Herald Publ. Co., 159 Fla. 296, 31 So. 2d 382 (1947). In *Cooper*, a local newspaper published an account of a shooting, stating that it occurred at appellant's restaurant. The shooting actually took place a short distance from the restaurant. The Florida supreme court affirmed a judgment for the newspaper. Again recognizing the local newspaper's daily responsibility of supplying world-wide news coverage, the court concluded that because the article "simply reflects an incident of public interest" appellant's failure to prove malice was determinative. *Id.* at 301, 31 So. 2d at 384. The Fifth Circuit Court of Appeals acknowledged Florida's innovative position in Crowell-Collier Publ. Co. v. Caldwell, 170 F.2d 941 (5th Cir. 1949). In *Caldwell*, a newspaper article charged the governor of Florida with indifference to the lynchings in his state. In reversing and remanding the excessive verdict for the governor, the court discussed the Florida supreme court's philosophy in *Layne*. The court observed that *Layne* stood for the proposition that public interests are better served by an extension, rather than a restriction, of the media's qualified privilege to publish matters affecting the interest of the general public. *Id.* at 943. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (acknowledging the "profound national commitment" to "uninhibited, robust and open-wide" debate on public issues).

43. 1933 Fla. Laws, ch. 16070, §§1-2 (current version at FLA. STAT. §§770.01-.02, 836.07-.08 (1979)).

44. 1933 Fla. Laws, ch. 16070, §1 (current version at FLA. STAT. §770.01 (1979)). The civil statute currently reads: "Before any civil action is brought for publication or broadcast in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he alleges to be false and defamatory." FLA. STAT. §770.01 (1979).

The current criminal statute reads: "Before any criminal action is brought for publication, in a newspaper periodical, of a libel, the prosecutor shall at least 5 days before instituting such action serve notice in writing on defendant, specifying the article and the statements therein which he alleges to be false and defamatory." FLA. STAT. §836.07 (1979).

45. *See* Ross v. Gore, 48 So. 2d 412 (Fla. 1950).

or apology was published after notice, then civil recovery was limited to actual damages, and the criminal action was barred.[46] The constitutionality of the civil statutes was upheld by the Florida supreme court in *Ross v. Gore*.[47] *Ross* provided the court with an opportunity to articulate its philosophy concerning a free press. The court concluded that a free press is a vital component of a democratic society[48] and that the press' function of policing society by reporting events through analytical criticism should not be inhibited.[49]

Recognition of the unique function of the publishing industry also resulted in extending to the press greater latitude for error. In *Ross*, the court reasoned that occasional errors were both inevitable and excusable because the preservation of democracy depends on rapid news dissemination to the public.[50] An earlier Florida supreme court opinion, recognizing the inevitability of factual media errors, stressed that libel law should not be used to redress every misstatement in a newspaper's publication.[51]

In 1964 the United States Supreme Court also concluded that occasional error must be tolerated as a necessary concomitant of a free and responsive

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46. 1933 Fla. Laws, ch. 16070, §2 (current version at FLA. STAT. §§770.02, 836.08 (1979)). The current civil statute reads: "If it appears upon the trial that said article or broadcast was published in good faith, that its falsity was due to an honest mistake of the facts, that there were reasonable grounds for believing that the statements in said article or broadcast were true, and that, within 10 days after the service of said notice, a full and fair correction, apology or retraction was, in the case of newspapers and periodicals, published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared and in as conspicuous place and type as was said original article or, in the case of a broadcast, the correction, apology, or retraction was broadcast at a comparable time, then the plaintiff in such case shall recover only actual damages." FLA. STAT. §770.02 (1979).

The criminal statute currently reads: "If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then any criminal proceeding charging libel based on an article so retracted, shall be discontinued and barred." FLA. STAT. §836.08 (1979).

47. 48 So. 2d 412 (Fla. 1950). It was unsuccessfully argued in *Ross* that FLA. STAT. §§770.01-.02 violated the equal protection clause of the fourteenth amendment because they apply only to media defendants. *Id.* at 414.

48. *Id.* at 415. "*'No government ought to be without censors: and where the press is free no one ever will.'*" *Id.* (emphasis by the court) (quoting Thomas Jefferson). *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) ("'Whatever is added to the field of libel is taken from the field of free debate.'") (*quoting from* Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 678 (1942)).

49. 48 So. 2d at 415. The court emphasized the importance of not placing unreasonable restraints on news reporters or editors. *Id.*

50. *Id.* The court stressed that the public must receive news on "pending" matters in time for its opinion to be formulated and expressed. *Id. But cf.* FLA. CONST. art. I, §4 (1968) (adopted from FLA. CONST. art I, §13 (1885)) (if the defamatory statement is true and published with good motives then the party shall be acquitted).

51. Layne v. Tribune Co., 108 Fla. 177, 184, 146 So. 234, 237 (1933). *Accord*, McCormick v. Miami Herald Publ. Co., 139 So. 2d 197, 200 (Fla. 2d D.C.A. 1962) (newspapers cannot be held to the minute details of the transactions they report).

press. A unanimous Court in *New York Times Co. v. Sullivan*[52] declared that the inevitable erroneous statement must be protected in order to give the media the breathing space it needs to survive.[53] The Court stressed the national commitment to the philosophy that discussion on public issues should be uninhibited and robust.[54] In accordance with the toleration and protection of erroneous statements, the Florida supreme court in *Ross*, and later the United States Supreme Court in *New York Times*, recognized that some degree of abuse would inevitably occur. Nevertheless, both courts concluded that occasional abuse was a lesser evil than application of the stringent early common law doctrines.[55]

Significantly, Florida's implementation of special treatment for the media defendant was based on judicial and legislative recognition of the role of the modern publisher in a free society. The strict common law policy of redressing every injury to reputation caused by a misstatement was gradually relaxed. The focus was shifted instead to the promotion of an informed populace through the receipt of publications on matters of public interest.[56]

Conversely, the United States Supreme Court in *New York Times*[57] extended breathing space to the media by transplanting the same strict liability concepts into an emerging first amendment doctrine.[58] The Court proceeded on the basic premise that the first amendment secured freedom of expression regarding public issues.[59] Therefore libel law as a "formula of suppression" would

52. 376 U.S. 254 (1964). A city official brought a libel action against a newspaper for printing an advertisement criticizing how the police handled a civil rights protest.

53. *Id.* at 271-72 (*quoting from* NAACP v. Button, 371 U.S. 415, 433 (1963)).

54. *Id.* at 270. The Court noted that even a false statement may make a valuable contribution by clarifying and reinforcing the truth when the two collide. *Id.* at 279 n.19. Truth as a defense to a defamation suit deters more than false statements due to the publisher's concern with proving truth in court. *Id.* at 279.

55. New York Times Co. v. Sullivan, 376 U.S. at 271; Ross v. Gore, 48 So. 2d at 415.

56. *See also* O. HOLMES, THE COMMON LAW 2 (1881) ("The life of the law has not been logic, but experience.").

57. *New York Times* has been acclaimed as a landmark case. Dean Prosser stated that *New York Times* was "unquestionably the greatest victory won by the defendants in the modern history of torts." W. PROSSER, HANDBOOK ON THE LAW OF TORTS 819 (4th ed. 1971). *See also* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208 (in *New York Times* the Court found that the heart of the first amendment was the protection of speech, and without it our democracy would cease to function).

58. The first amendment doctrine established in *New York Times* led to the promulgation of new protections in such areas as commercial advertising, obscenity and privacy. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (first amendment right to distribute and receive commercial information); Stanley v. Georgia, 394 U.S. 557 (1969) (first amendment privilege to view obscene material in the privacy of one's own home); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to receive birth control information premised on the right of privacy as a penumbra of the first, fifth and ninth amendments).

59. 376 U.S. at 269. " 'The interest of the public here outweighed the interest of appellant or any other individual. The protection of the public requires not mere discussion, but information.' " *Id.* at 272, *quoting* Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942) (libel action by a congressman based on news article accusing him of anti-semitism), *cert. denied*, 317 U.S. 678 (1943).

not be tolerated.[60] Confined to its narrowest interpretation, *New York Times* held that a public official could not recover damages for a defamatory falsehood about his official conduct unless he proved that the statement was made with actual malice.[61] However, the Court's later applications of the basic premise of *New York Times* resulted in constitutional protection for a much larger array of defamation suits.[62] The broad-based policies espoused by the Florida supreme court and the United States Supreme Court required further elucidation. However, the courts' primary concern with the public's need to receive information on public issues served as the guide throughout the refinement process.[63]

Stage Two: Defining the Scope of Public Interest

Following the development of a qualified privilege for media defendants based on their unique function in a democratic society, the more difficult task of defining the limits of this privilege began. This second stage of evolution required a determination of when the reputational and privacy interests of the individual should succumb to the publisher's desire to disseminate, and the public's need to receive, information on public issues. The core of analysis was privacy,[64] focusing on what matters should be deemed public, thereby bringing a qualified privilege to their discussion.[65]

Prior to the United States Supreme Court's parallel decisions, the Florida

60. 376 U.S. at 285-86. The Court noted that the self-censorship effect of libel suits arises from three factors. First, the possibility of an adverse judgment without criminal law safeguards such as proof beyond a reasonable doubt. Second, the imposition of large damage awards without proof of actual loss. Finally, the possibility of other judgments arising from the same publications. *Id.* at 277-78.

61. Actual malice was created as the standard of fault to govern constitutionally protected defamatory falsehoods. The Court defined actual malice as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The term "reckless disregard" was refined in St. Amant v. Thompson, 390 U.S. 727 (1968), where the Court explained that reckless disregard did not refer to whether a reasonable man would have published the article without further investigation. Instead, the focus was whether the particular defendant "entertained serious doubts as to the truth of his publication." 390 U.S. at 731. The Court in *New York Times* also mandated "convincing clarity" as the standard of proof required, as opposed to the tort law standard of preponderance of the evidence. 376 U.S. at 285-86. A third concept of *de novo* appellate review was sanctioned and utilized by the Court for constitutionally protected defamatory statements. 376 U.S. at 285-92.

62. *See, e.g.,* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (defamed private figures involved in matters of public concern or interest must prove actual malice); Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967) (actual malice standard applies to public figures); Time, Inc. v. Hill, 385 U.S. 374 (1967) (actual malice standard applied to privacy suit involving matter of public interest). *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (actual malice standard not mandated for private figures). *See generally* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976).

63. *See, e.g.,* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech and not enforced silence, only an emergency can justify repression.").

64. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967); Jacova v. Southern Radio & Television Co., 83 So. 2d 34 (Fla. 1955).

65. See note 40 *supra.*

courts made this determination. However, the two courts were dealing with different kinds of qualified privileges. Because the Florida case law was developed before *New York Times* and its promulgation of an actual malice standard of fault, the Florida courts were treating a qualified privilege that was protected by the requirement of express malice, the common law standard of fault.[66] Nonetheless, this distinction does not vitiate the precedental significance of Florida's early case law development. The similar contours of the standards adopted by the Florida courts and the United States Supreme Court suggests that the limits of the media's qualified privilege did not depend on the differing focuses of express and actual malice.[67] Additionally, the Florida supreme court relied on the precedent established in these early decisions when it subsequently adopted an actual malice standard for matters of public interest.[68]

The greatest latitude for press coverage and public exposure was extended to publications regarding the conduct of public officials. The Florida supreme court reasoned that a candidate for public office places his character in issue to the extent it may affect his qualifications for office.[69] Thus, express malice must be proven to impose liability for defamatory publications regarding the public official's character.[70] The United States Supreme Court subsequently declared that publications about the character or qualifications of a public official or candidate were relevant to his fitness for office, and consequently within the first amendment's qualified protection.[71] Although the realm of public interest in the qualifications and conduct of public officials and candidates is necessarily broad, the courts did not preclude the possibility that a private sphere still existed for such persons.[72]

A qualified privilege was also extended to published material about

66. See note 29 *supra.*

67. See note 40 *supra.*

68. *See* Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970), *cert. denied,* 410 U.S. 984 (1973), *relying on* Jacova v. Southern Radio & Television Co., 83 So. 2d 34 (Fla. 1955) and Abram v. Odham, 89 So. 2d 334 (Fla. 1956).

69. State *ex rel.* Arnold v. Chase, 90 Fla. 1071, 1074, 114 So. 856, 857 (1927). A newspaper published an article stating that a candidate for city commission had committed forgery and duplication. Reversing the criminal libel conviction, the Florida supreme court stated that the publisher had a qualified privilege to publish the article since it related to the public's welfare. *Id.*

70. *Id.* In White v. Fletcher, 90 So. 2d 129 (Fla. 1956) the Florida supreme court extended this qualified privilege to statements about anyone who seeks public patronage, reasoning that persons who seek public employment submit themselves to the scrutiny of those whose patronage they seek. Thus, these public figures are subject to fair comment. *Id.* at 131.

71. Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971). A charge of criminal conduct against a public official or candidate was held relevant to his fitness for office no matter how remote in time or place. *Id.* at 277. *Accord,* Ocala Star Banner Co. v. Damron, 401 U.S. 295, 300-01 (1971).

72. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 n.16 (1971) (there are aspects of a public official's life that are not of public concern); Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) (open issue as to whether there remain aspects of a public official's life that are not afforded first amendment protection); *see* State *ex rel.* Arnold v. Chase, 90 Fla. 1071, 1075, 114 So. 856, 858 (1927) (the qualified privilege does not embrace the right to attack the private character of public men).

persons who voluntarily inject themselves into an issue of public interest, that is, public figures.[73] In 1956, the Florida supreme court in *Abram v. Odham*[74] affirmed the lower court's dismissal of a complaint against a newspaper that published a political candidate's defamatory remarks about the plaintiff and his pre-election survey. The court concluded that the newspaper's qualified privilege to publish matters of public interest was buttressed by plaintiff's voluntary entry into a matter of public concern.[75] The *Abram* analysis closely resembles the 1967 United States Supreme Court decision in *Associated Press v. Walker*.[76] A retired Army general was accused in a magazine publication of leading a violent racial riot at the University of Mississippi. The Court determined the public's interest in the circulation of the material involved and the plaintiff's purposeful thrusting of himself into an important public controversy,[77] justified classifying the plaintiff as a public figure. He was therefore required to prove actual malice.[78]

However, the two most significant cases defining the limits of the qualified privilege to publish matters of public interest arose not from libel suits but from privacy actions. The issue before the courts concerned whether the media's qualified privilege extended to actors in newsworthy events who desired anonymity. Both the Florida and United States Supreme Courts circumscribed the realm of privacy for even the involuntary actor.

In *Jacova v. Southern Radio & Television Co.*[79] the plaintiff, a bystander, was portrayed in a film telecast of a gambling raid at a cigar store as he was being questioned by police investigators. Speaking to the plaintiff's privacy interests, the Florida supreme court concluded that one "emerges from his seclusion" by being present at the occurrence of an event of public interest.[80] The court extended a qualified privilege to the media's use of the name or

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73. Abram v. Odham, 89 So. 2d 334, 336 (Fla. 1956).

74. 89 So. 2d 334 (Fla. 1956).

75. *Id.* at 336. The newspaper's co-defendant was the candidate who had made the defamatory comments. Although the Florida supreme court found there was insufficient evidence of malice on the part of the newspaper, the court remanded for further proceedings. *Id.* at 336, 338.

76. 388 U.S. 130 (1967).

77. *Id.* at 154-55. The companion case of *Curtis Publ. Co. v. Butts* involved a magazine's accusation that the plaintiff, a well-known football coach, had fixed a football game at the University of Georgia. The Court concluded that the plaintiff had attained the status of a public figure by virtue of his position. *Id.* at 155. Thus two categories of public figures were delineated, both of which would be held to a standard of actual malice.

78. Justice Harlan, speaking for the Court, professed that the standard of fault should be "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Only a punitive damage recovery should be subject to an actual malice standard. *Id.* at 161. However, a majority of the Court joined Chief Justice Warren's concurring opinion mandating an actual malice standard of fault for public figures. *Id.* at 166. (Joined by Black, Douglas, Brennan and White, JJ.). The Chief Justice reasoned that the standard proposed by Justice Harlan was an inadequate guide for a jury of laymen and failed to afford speech first amendment protection. *Id.* at 163.

79. 83 So. 2d 34 (Fla. 1955).

80. *Id.* at 36.

photograph of a person who had become an actor in a newsworthy event regardless of the involuntary nature of his actor role.[81]

Both the holding and analysis in *Jacova* are analogous to the subsequent United States Supreme Court decision in *Time, Inc. v. Hill.*[82] Plaintiff brought an action under a state privacy statute when a magazine reported that a current play accurately portrayed the experiences of his family when they were held captive in their home by escaped convicts. The Court concluded that in our society exposure of one's self to others in varying degrees is an inevitable aspect of life.[83] Because the article involved a matter of public concern, the Court determined that the privacy interest of the individual must yield to the primary value that society places on the freedom of the press.[84] Therefore, an actual malice standard of fault was deemed to apply.[85]

Stage Three: Adopting an Actual Malice Standard For Matters of Public Concern

The firmly established media privilege that included actors who desired anonymity, coupled with both the state and federal courts' consistent focus on matters of public concern or interest,[86] triggered the culminating step. At both levels the actual malice standard was applied to defamation suits brought by private individuals involved in matters of public interest or concern. Similar to the privilege conferred in the privacy cases, this qualified privilege did not focus on the status of the defamed party, but rather on the subject matter of the communication.[87] The courts recognized that the public's interest did not depend solely on the plaintiff's notoriety or lack thereof, but instead on the subject matter of the publication,[88] and concluded that official recognition should be given to this reality.

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81. *Id.* at 37. *See also* Stafford v. Hayes, 327 So. 2d 871, (Fla. 1st D.C.A. 1976) (relying on *Jacova*, the court recognized the media's qualified privilege to televise plaintiff's picture in conjunction with a report on the evacuation of a capitol building due to a bomb threat).

82. 385 U.S. 374 (1967).

83. *Id.*, at 388.

84. *Id.* The Court stated its holding was limited to the facts and the opportunity to rebut might be germane if this were a libel suit. *Id.* at 391. *But see* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (actual malice standard extended to private defamation suits involving matters of public interest). *See generally* Wright, *Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630 (1968) (proposing factors to be considered in the balance of society's "right to know" against the protection of the individual's privacy).

85. 385 U.S. at 390. Justice Brennan, speaking for the Court, rejected a negligence standard because its elusive quality would intolerably burden the press with deciding how a jury would assess the reasonableness of the publisher's verification of references to a name or picture. *Id.* at 389. Furthermore, a negligence standard would create the potential danger of penalizing even legitimate utterances due to the lack of guidance it affords. *Id.*

86. See note 39 *supra.*

87. See text accompanying notes 79-85 *supra.*

88. "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect,

In 1970, the Florida supreme court in *Gibson v. Maloney*[89] promulgated the qualified privilege of "fair comment on a public matter."[90] The plaintiff in *Gibson* acquired a small weekly newspaper and immediately began an editorial campaign against the Alfred I. duPont estate and its affiliates. In an address to a business club, the president of one of the estate's affiliated companies accused the plaintiff of causing his business to decrease and of hindering the community's growth. Although the court found the plaintiff a public figure due to his publishing activities,[91] the court's inquiry went further. Relying on *Jacova* and *New York Times*, the court focused on its prior conclusion in *Jacova* that one emerges from his seclusion by becoming an actor in an event of public interest.[92] The *Jacova* precedent, coupled with *New York Times'* primary commitment to robust debate on public issues,[93] led the court to conclude that an actual malice standard should protect the qualified privilege to comment on public matters.[94]

Subsequently, a Florida district court of appeal applied the qualified privilege developed in *Gibson* to media defendants.[95] Utilizing reasoning similar to that in *Gibson*, many lower federal courts also adopted a constitutional privilege for publications about private individuals involved in matters of public interest.[96] In a series of three decisions, the Fifth Circuit Court of

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and significance of the conduct, not the participant's prior anonymity or notoriety." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

89. 231 So. 2d 823 (Fla. 1970), *cert. denied*, 410 U.S. 984 (1973).

90. 231 So. 2d at 826.

91. *Id.* at 824. The court did not refer to any of the United States Supreme Court decisions regarding the applicability of an actual malice standard for public figures such as Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967). The only United States Supreme Court decision cited by the majority was *New York Times*. Instead, the court relied on its prior conclusion in *Abram*. See text accompanying notes 74-75 *supra*.

92. 231 So. 2d at 825. See text accompanying notes 79-81 *supra*.

93. 231 So. 2d at 825-26. The court quoted extensively from the sections of *New York Times* that dealt with the first amendment freedom of expression upon public questions. *Id.*

94. *Id.* at 826. The conclusion that *Gibson* was not merely a public figure case is buttressed by the analysis of the First District Court of Appeal in Gibson v. Maloney, 263 So. 2d 632 (Fla. 1st D.C.A. 1972), *cert. denied*, 410 U.S. 984 (1973). On remand from the Florida supreme court, the circuit court entered a jury verdict for the plaintiff. In reversing, the district court relied on the Florida supreme court's former disposition in *Gibson* and on the intervening decision of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). 263 So. 2d at 635. Instead of determining whether or not the plaintiff was a public figure, the court concluded that the case fell within the ambit of the constitutional protection of matters of public interest or concern. *Id.* at 635-38.

95. In Bishop v. Wometco Enterprises, Inc., 235 So. 2d 759 (Fla. 3d D.C.A.) (per curiam), *cert. denied*, 240 So. 2d 813 (Fla. 1970), a television station aired editorials about the plaintiff's testimony before the city commission. Relying on *Gibson* and *New York Times*, the court concluded that whether the plaintiff was a public official, a public figure, involved in a matter of public interest or whether his testimony was a matter of public interest, an actual malice standard applied. 235 So. 2d at 761. The court also relied on three Fifth Circuit Court of Appeals decisions, decided prior to *Rosenbloom*. *Id.* See note 97 *infra*.

96. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969) (police raid for obscene books), *aff'd*, 403 U.S. 29 (1971); Wasserman v. Time. Inc., 424 F.2d 920 (D.C. Cir.) (lawyer eating lunch with reputed gangsters), *cert. denied*, 398 U.S. 940 (1970); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706 (9th Cir. 1968)

Appeals concluded that *New York Times* and its progeny supported the extension of an actual malice standard of fault to matters of public interest, irrespective of the plaintiff's status.[97]

In 1971, the United States Supreme Court responded to these lower court developments in *Rosenbloom v. Metromedia, Inc.*[98] *Rosenbloom* involved a

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(pharmaceutical and laboratory testing); Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970) (prosecution of policeman), aff'd, 471 F.2d 801 (7th Cir. 1972), *rev'd,* 418 U.S. 323 (1974); DeSalvo v. Twentieth Century-Fox Films Corp., 300 F. Supp. 742 (D. Mass. 1969) (notorious individual crime); Arizona Biochem. Co. v. Hearst Corp., 302 F. Supp. 412 (S.D. N.Y. 1969) (garbage pickups); Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S.D. N.Y. 1967) (hospital for the criminally insane). Several commentators also predicted that the Court would not permit a public-private figure distinction when matters of public interest were involved. *See, e.g.,* Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?,* 18 U.C.L.A. L. Rev. 371, 378-79 (1970) (predicting that the Supreme Court will extend an actual malice standard to matters of public concern); Note, *Public Official and Actual Malice Standards: The Evolution of New York Times Co. v. Sullivan,* 56 IOWA L. REV. 393, 399-400 (1970) (hypothesizing that the Court will extend the *New York Times* rule to matters of public concern in light of the circuit courts of appeals decisions); Note, *The Scope of First Amendment Protection for good-Faith Defamatory Error,* 75 YALE L.J. 642, 644-45 (1966) (suggesting that the Court will redefine the public official category in order to protect the private lives of such persons by focusing on the relevancy of the subject matter of the publication).

97. In Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969), the court concluded that a constitutional privilege extends to individuals not associated with the government "if those individuals are involved in matters of important public concern." *Id.* at 573. The court relied on the Supreme Court's application of an actual malice standard in *Hill,* noting that the case involved a matter of great public concern. *Id.* Furthermore, the court agreed with the Ninth Circuit's conclusion in United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706 (9th Cir. 1968), that *New York Times* had not marked the "outer limit," but rather was open to further definition. 406 F.2d at 573. Consequently, the court remanded with instructions for summary judgment for the magazine which had mentioned the plaintiff's name in an article about organzied crime in the Bahamas. *Id.*

Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970), involved a magazine article about the Masters Golf Tournament, and in particular the declining condition of plaintiff's hotel. Affirming the lower court's summary judgment for the magazine, the court stated that although the plaintiff in *McLaney* resembled a public figure, absent proof of actual malice, publication of matters of public interest are constitutionally protected. *Id.* at 861. The court also noted that since *New York Times* was announced the Supreme Court continued to emphasize that the first amendment secures freedom of expression on public issues. *Id.*

In Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970), the defendant magazine published a picture of seven men seated in a restaurant and referred to the gathering as a meeting of the "top Cosa Nostra hoodlums." Actually, two of the men pictured were attorneys representing the alleged "hoodlums." *Id.* at 220. The court concluded that even if the plaintiff attorney was not a public figure, an actual malice standard of fault applied because the article involved a matter of public interest. *Id.* at 221.

98. 403 U.S. 29 (1971). The Court noted that numerous lower courts had already recognized a constitutional privilege for matters of public interest. *Id.* at 46 n.14. The plurality stressed that the common element in all of these cases was a "defamatory falsehood in the report of an event of 'public or general interest.'" *Id.* at 30-31, (Brennan, J.). Parallel to the Florida supreme court's reliance in *Gibson* on the *Jacova* privacy case, the Court placed strong reliance on its prior decision in *Hill. Id.* at 47-48. See text accompanying note 92 *supra.*

libel suit against a radio station arising from its defamatory statements about a police raid of plaintiff's obscene books.[99] The Court determined that because a matter of public or general interest was involved, the statements were constitutionally protected and thus governed by an actual malice standard of fault.[100]

Justice Brennan, writing for the plurality,[101] elucidated the impropriety of a public-private figure distinction, observing four major defects in predicating a constitutional privilege on such a distinction. First, the public's interest in the event reported does not depend on the voluntariness of the actor's involvement, nor on his prior notoriety or anonymity. The public's primary interest is in the event itself.[102] Second, public figures and public officials deserve as much protection of their reputations as do private individuals.[103]

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99. Plaintiff, a distributor of nudist magazines, was arrested on charges of selling obscene material, and his books and magazines were seized. The police captain phoned the radio station and informed it of the raid and arrest. Petitioner sued the radio station for failing to report that the 3,000 items seized were only allegedly obscene. In its radio coverage of the court proceeding in which petitioner sought injunctive relief against police interference with his business, the newscasts also referred to the "smut literature racket" and "girlie-book peddlers." 403 U.S. at 34. The Third Circuit reversed a judgment against the radio station, holding that the *New York Times* privilege applied because the broadcast involved a matter of public concern. 415 F.2d 892 (3d Cir. 1969).

100. 403 U.S. at 52. Justice Brennan rejected a negligence standard because a jury's determination of reasonable care would not provide adequate breathing space for the freedoms of speech and press. *Id.* at 50. Justice Brennan also reiterated the concerns he had expressed in *Hill* about the elusiveness of a negligence standard. *Id.* See note 85 *supra*. A preponderance of the evidence standard was also rejected because of the concern that an erroneous verdict in a libel case was "most serious" since it "would create a strong impetus toward self-censorship." 403 U.S. at 50. The Court adopted the standard of convincing clarity, which previously had applied to actual malice. *Id.* 101.

Justice Brennan was joined by Chief Justice Burger and Justices Blackmun and Black. Justice Black concurred separately, reiterating his view that the first amendments was intended to give the press an absolute privilege from libel judgments. *Id.* at 57. Justice Douglas did not participate in the decision; however, he had consistently aligned himself with Justice Black's belief that the first amendment bars all libel actions against the media. *See* Curtis Publ. Co. v. Butts, 388 U.S. 130, 170-72 (1967) (Black, J., joined by Douglas, J., concurring in part and dissenting in part); Time, Inc. v. Hill, 385 U.S. 374, 401-02 (1967) (Douglas, J., concurring); New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964) (Black, J., joined by Douglas, J., concurring); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 356-57 (1974) (Douglas, J., dissenting). Justice White concurred in judgment, but concluded that the case should be decided on the more narrow principle that *New York Times* gave the media a qualified privilege to report upon the official actions of public servants. 403 U.S. at 60-62.

The three dissenters were Justices Harlan, Marshall and Stewart. Justice Harlan stated that a simple negligence standard should apply to private individuals because of their limited access to rebuttals and their involuntary role as public personalities. *Id.* at 68-71. Justice Harlan's ultimate conclusion was that the states should define the applicable standard of care in private libel actions "so long as they do not impose liability without fault." *Id.* at 64. In addition, compensatory damages should be predicated on a showing of actual injury, and punitive damages should be awarded only if actual malice is proven. *Id.* Justice Harlan's reasonable care standard has been rejected by the majority in Curtis Publ. Co. v. Butts, 388 U.S. 130, 166 (1967), see note 78 *supra*, but it parallels Justice Powell's majority opinion in *Gertz*. See notes 118-127 and accompanying text, *infra*.

102. *Id.* at 43. See note 88 *supra*.

103. 403 U.S. at 45-46. "The *New York Times* standard was applied to libel of a

Additionally, the ability to rebut defamatory falsehoods successfully is not conditioned on the individual's status, but rather on the unpredictable continuing interest of the media and the public.[104] Finally, predicating a constitutional privilege on the voluntariness of one's exposure does not survive constitutional scrutiny because everyone is necessarily a public person to some degree.[105] Moreover, such a distinction would produce anomalous results. It would repress discussion on matters of public concern simply because a private citizen happened to be involved, while constitutionally stimulating discussion on the aspects of lives of public figures that are not matters of public concern.[106]

The extensions in *Gibson* and *Rosenbloom* solidified a constitutional privilege that focused on the essence of the first amendment, the right to receive information on issues that affect daily life.[107] Moreover, in balancing a free press against the vindication interests of the defamed individual, the first amendment rests on one side of the balance with no countervailing constitutional provision on the other. At least seventeen states, including Florida, and several federal appellate courts embraced and applied the *Rosenbloom* standard.[108]

In *Firestone v. Time, Inc.*[109] the Florida supreme court concurred that publications about matters of public concern should be constitutionally

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public official or public figure to give effect to the amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life." *Id.*

104. *Id.* at 46. The Court noted that a rebuttal seldom overrides the impact of the original statement for either a public or private individual. Furthermore, the argument that public officials and public figures have greater access to the channels of effective counter-criticism is considerably weakened when those public officials or public figures hold minor positions or have been terminated. *Id. See, e.g.,* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (former supervisor of a county owned ski-resort was held to be a public official because he was a government employee who appeared to the public to have control over government affairs).

105. 403 U.S. at 48. See text accompanying note 83 *supra.*

106. *Id.* The Court expressly left open the issue of what standard of fault should apply to publications not within the area of public or general interest, noting that there is a private sphere to both the notorious and anonymous individual's life. *Id.* at 44 n.12, 48.

107. *Contra,* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.,* 54 TEX. L. REV. 199, 211 (1976). Justice Brennan explained that to preserve the first amendment guarantees, discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 403 U.S. at 41 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)). *See generally* Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond,* 6 RUT.-CAM. L. REV. 471, 474-80 (1975) (explaining the merits of the *Rosenbloom* holding). *See also* Anderson, *Libel Law Today,* 14 TRIAL 19, 19 (May 1978) (*Rosenbloom* applied the *Time* rule to its logical end); Kalven, *supra* note 57, at 208 (the core of the first amendment is the protection of speech, without which we could not function).

108. For a comprehensive list of the decisions that applied the *Rosenbloom* holding prior to *Gertz,* see Gertz v. Robert Welch, Inc., 418 U.S. 323, 377 n.10 (1974) (White, J., dissenting).

109. 271 So. 2d 745 (Fla. 1972), *rev'd on other grounds per curiam,* 305 So. 2d 172 (Fla. 1974), *rev'd,* 424 U.S. 448 (1976).

protected regardless of whether they relate to prominent or obscure individuals.[110] The Florida supreme court in *Firestone* sought to refine *Rosenbloom* by developing a workable test for determining when an individual's activities do not involve a matter of public concern, so that a a publication about them is not constitutionally protected.[111] A test was promulgated that focused on whether a logical relationship existed between the subject matter reported and genuine public concern.[112] Whether this relationship existed was held to be a question of law, allowing a publisher to avoid "gambling" on a jury's subsequent judgment of reasonableness.[113] *Firestone* involved in a libel action by the divorced wife of a wealthy tire industrialist based on an erroneous magazine report which stated that the divorce was granted on the grounds of extreme cruelty and adultery.[114] The long divorce trial elicited more than eighty-five articles in local newspapers, and the wife held several press conferences during the pendency of the proceeding. Nontheless, the Florida supreme court concluded that a logical relationship did not exist between the marital difficulties of the appellant and real concern of the public.[115] Prurient curiosity, the only possible basis for public concern, was determined to be an improper predicate upon which to extend protection.[116]

The effect of *Gibson* and *Firestone* was the establishment in Florida of an actual malice standard for defamation suits brought by private individuals involved in matters of public concern.[117] *Gibson*'s promulgation of this standard

110. 271 So. 2d at 749.

111. See note 106 *supra*.

112. 271 So. 2d at 751. The court explained that the test for public figures and matters of public concern is "whether there is a *logical relationship* between the reported activities of the prominent person, or between the subject matter of the conduct, occasion or event reported or recorded, and the real concern of the public." *Id.* (emphasis by the court).

113. *Id.* "[R]easonable men cannot differ on what is logical although logical men may differ on what is reasonable." *Id.*

114. The divorce decree stated that her husband had counterclaimed on the grounds of extreme cruelty and adultery, and the extramarital escapades of appellant would have made "Dr. Frued's hair curl." The decree however was granted on the grounds of lack of domestication. Firestone v. Firestone, 249 So. 2d 719 (Fla. 4th D.C.A. 1971). On appeal, the Florida supreme court held that lack of domestication was not grounds for divorce in Florida, but sustained the divorce on the ground of extreme cruelty. Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972) (per curiam).

115. 271 So. 2d at 752. The court hypothesized that if one of the divorcing parties was a marriage counselor, then a logical relationship would have existed between the divorce action and the concern of the public whose patronage is sought. *Id.*

116. *Id.* The court explained that the focus should be on the public's real *concern*, rather than merely on the public's *interest*, in the matter involved. It concluded that focusing on concern more appropriately followed the rationale of the constitutional protection extended in *Rosenbloom*. *Id.*

117. Relying on *Firestone* and *Rosenbloom*, the Third District Court on Appeal applied a constitutional privilege to matters of public concern in Nigro v. Miami Herald Publ. Co., 262 So. 2d 698 (Fla. 3d D.C.A.), *cert. denied*, 267 So. 2d 834 (Fla. 1972). The libel suit was based on newspaper articles about a group of persons who flew to Miami and were served with federal grand jury subpoenas at the airport. The articles described the group as "Cosa Nostra members and their associates" and as "henchmen of midwestern Mafia leaders." The plaintiffs claimed they had come to Miami for a golfing weekend and were

prior to the mandate of *Rosenbloom* demonstrates Florida's voluntary commitment to the dissemination of information on public matters. The "logical relationship" test developed in *Firestone* facilities such dissemination while concurrently protecting the individual's private sphere.

A Retreat by the United States Supreme Court

Three years after *Rosenbloom, Gertz v. Robert Welch, Inc.*[118] was decided by the United States Supreme Court. A narrow majority of the Court held that the states were no longer compelled to follow *Rosenbloom*.[119] The Court did not decide whether a standard less than actual malice was required for publications about private individuals involved in matters of public interest. Instead, the Court permitted each state to determine its own standard of fault for libel actions brought by private individuals. The primary guideline furnished to the states was that liability could not be imposed without fault.[120]

Premised on the caveat that the new open standard would not promote justice in every case,[121] the Court proceeded to rationalize its distinction be-

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not involved in criminal activities. Affirming the lower court's summary judgment for the newspaper, the court concluded that the control of organized crime was an issue of public concern. *Id.* at 699-700.

118. 418 U.S. 323 (1974). An attorney had been hired by a family whose son had been killed by a policeman to represent them in civil litigation against the policeman. An article published by the defendant magazine stated the trial was part of a national conspiracy to discredit local law enforcement agencies in order to create a Communist dictatorship and portrayed the attorney as a "Communist-fronter" and a "Leninist." No effort was made to verify or substantiate these charges, all of which contained serious inaccuracies. Furthermore, the petitioner had not taken part in the criminal trial; he had only attended the coroner's inquest and initiated civil action. The district court reversed the lower court's jury verdict for the attorney and entered a *j.n.o.v.* on the anticipated reasoning of *Rosenbloom*. Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 999-1000 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972).

119. Justices Stewart, Marshall and Rehnquist joined in Justice Powell's opinion. In a separate concurring opinion, Justice Blackmun, who had joined the plurality in *Rosenbloom*, stated he would have adhered to his prior view, but he believed that a definitive ruling was essential and his vote was needed to create a majority. Nevertheless, he did profess that *Rosenbloom* was "logical and inevitable." *Id.* at 354. *See also* Frakt, *supra* note 107, at 472 (commenting on the reluctant concurrence of Justice Blackmun).

Gertz' retreat from the views expressed by the Court in *New York Times* through *Rosenbloom* has been explained by the change from the Warren to the Burger Court. *See* Anderson, *supra* note 107, at 19. Professor Anderson explained that the Burger Court has focused on the individual's interest in reputation, rather than on the dangers of self-censorship which concerned the Warren Court. *Id.*

120. 418 U.S. at 347.

121. *Id.* at 344. The Court premised its opinion on three caveats. First, the broad rules stated by the Court do not encompass all the considerations involved, and thus they will not necessarily be ideal when applied to each particular fact situation. *Id.* Second, although rebuttal seldom alleviates the harm caused by a defamatory statement, that does not make the self-help remedy irrelevant to the Court's inquiry. *Id.* at 344 n.9. Third, even if the private-public figure distinction is not appropriate in every case, the media should be able to act on the assumption that public figures voluntarily accept the risk of defamation. *Id.* at 345.

tween private and public figures. The self-help remedy of rebuttal was deemed to be available exclusively to public figures, so that private individuals are more vulnerable to injury.[122] The distinction was also based on the conclusion that public officials and public figures "invite attention and comment" by becoming involved in public controversies.[123] Exposure by the media as a consequence of such voluntary involvement was determined to justify the burden of proving actual malice.[124] Rejection of the *Rosenbloom* focus on whether matters were of public concern, was premised on the determination that *Rosenbloom* forced judges to decide on an ad hoc basis.[125] The Court nevertheless cautioned that recovery of punitive damages would require a showing of at least actual malice.[126] The state's interest in compensating individuals for injury to reputation was held to extend no further than compensation for actual injuries.[127]

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122. *Id.* at 344. The Court conceded that a rebuttal seldom alleviates the injury of a defamatory statement. *Id.* at 344 n.9. See note 103 and accompanying text, *supra.*

123. 418 U.S. at 344-45. Public figures were defined in two ways: as persons who occupy positions of pervasive power and influence; and as those who inject themselves into a particular public issue in an effort to influence its outcome. Both types of public figures "assumed roles of especial prominence in the affairs of society." *Id.* at 345. *Gertz* has been criticized for failing to accomplish its desired avoidance of the public interest issue, since it bases public figure status on the person's involvement in matters of public interest. *See* Frakt, *supra* note 107, at 486. It is also perceived as punishing those who participate in public affairs, while rewarding those who engage in mundane pursuits. *Id.* at 487. The decision is further faulted for its failure to extend any protection to the private lives of public figures. *Id.* See note 106 *supra.*

124. 418 U.S. at 345. The Court noted that one could become an "involuntary public figure," but did not explain when such a label would apply. *See id.*

125. *Id.* at 346. The courts seem to have difficulty in determining whether a particular plaintiff is a public figure. The circuit court in *Gertz* doubted the district court's determination that Gertz was a public figure, 471 F.2d 801, 805 (7th Cir. 1972), and the Supreme Court concluded that Gertz was not a public figure, 418 U.S. at 352. A similar disagreement about the public figure determination occurred in Time, Inc. v. Firestone, 424 U.S. 448 (1976). The majority concluded that the respondent was not a public figure, although her notoriety was so great that she subscribed to a press-clipping service. *Id.* at 453-54. Justice Marshall's strong dissent stated that she was undoubtedly a public figure. *Id.* at 484-88. *See also* Frakt, *supra* note 107, at 487 (determining when an individual is a public figure "for a limited range of issues" will necessarily entail ad hoc determinations of what is and what is not a public issue). See note 189 *infra.*

126. 418 U.S. at 348-49. Subsequent to *Gertz* several states have barred punitive damage awards in defamation suits. *See, e.g.,* Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 860, 330 N.E.2d 161, 169 (1975) (no punitive damages in any defamation action); Wheeler v. Green, 286 Or. 99, 110, 593 P.2d 777, 789 (1979) (common law defamation suits limited to compensatory damages); Taskett v. King Broadcasting Co., 86 Wash. 439, 447, 546 P.2d 81, 86 (1976) (private plaintiffs cannot recover punitive damages in defamation suits). *Cf.* FLA. STAT. §770.02 (1979) (recovery limited to actual damages in any media defamation suit if originally published with good motives and subsequently retracted).

127. 418 U.S. at 348-49. The Court left the task of defining "actual injury" to the lower courts, but determined that it would not be limited to pecuniary loss. Actual damages could include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 349-50. The Court stressed its disapproval of the common law presumption of damages because it allowed substantial awards without proof of damage to reputation. *Id.* at 349. Nonetheless, the Court has subsequently recognized a cause of action in libel even though the complaint did not charge damage to reputation.

The Florida supreme court and the United States Supreme Court positions diverged after *Gertz*. Heretofore, the two courts had paralleled each other in analyses and holdings.[128] However, no pre-*Gertz* or post-*Gertz* Florida supreme court decisions have dislodged Florida from the *Gibson* and *Firestone* philosophy.[129]

Subsequent to *Gertz*, three Florida district courts of appeal have summarily concluded that *Gertz* established a dual standard for defamation suits based upon the plaintiff's status.[130] Two of the courts, while stating this presumption, failed to express what standard of fault now applies to libel suits brought by private individuals.[131] The other court applied a negligence standard.[132] However, the court's decision to use this standard was based on an erroneous interpretation of a Florida supreme court decision that had been reversed by the United States Supreme Court precisely because it failed to enunciate a standard of fault.[133]

Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976). Justice Brennan's dissent in *Gertz* predicted the Court's liberal conceptualization of "actual damages" would ultimately be used by juries to punish unpopular expressions. 418 U.S. at 367.

128. See note 40 *supra*.

129. After *Gertz* the Florida supreme court again dealt with the *Firestone* case in Firestone v. Time, Inc., 305 So. 2d 172 (Fla. 1974) (per curiam). *Firestone II* gave the court an opportunity to review its prior acceptance and application of *Rosenbloom* in *Firestone I*, 271 So. 2d at 748-52. See notes 109-116 and accompanying text, *supra*. However, the court quoted from its previous conclusion that the divorce action was not a matter of public concern; thus the publication was not constitutionally protected. 305 So. 2d at 175. The only reference to the intervening *Gertz* decision was to its definition of actual injury, which was cited to support the trial court's instructions on actual damages. *See id.* at 176. The court concluded that the publication was actionable per se because it falsely accused a woman of adultery. *Id.* at 175. Reversing the lower court's judgment for the magazine publisher, the Florida supreme court made references to three different standards of fault, but did not indicate which one it was applying. *Id.* at 177-78. The court's failure to specify which standard of fault it was utilizing resulted in the United States Supreme Court vacating and remanding the Florida supreme court decision. Time, Inc. v. Firestone, 424 U.S. 448, 464. The United States Supreme Court did, however, uphold the Florida supreme court's finding that the divorce action was not a matter of public concern. *Id.* at 453-55. Thus it appears that even if *Firestone II* indicates a tendency for Florida to adopt a negligence standard, this tendency would only apply to defamation suits *not* involving a matter of public concern.

An appeal is presently pending before the Third District Court of Appeal in which a publisher has expressly asked the court to determine what standard of fault applies to private individuals involved in matters of public concern. Miami Herald Publ. Co. v. Ane, No. 79-1463 (Fla. 3d D.C.A., filed Dec. 20, 1979) (oral argument presented July 1, 1980).

130. Karp v. Miami Herald Publ. Co., 359 So. 2d 580 (Fla. 3d D.C.A. 1978) (per curiam); Finkel v. Sun Tattler Co., 348 So. 2d 51 (Fla. 4th D.C.A.) (per curiam) (dictum), *cert denied*, 358 So. 2d 135 (Fla. 1978); Helton v. United Press Int'l, 303 So. 2d 650 (Fla. 1st D.C.A. 1974).

131. Finkel v. Sun Tattler Co., 348 So. 2d 51, 52 (Fla. 4th D.C.A.) (per curiam), *cert. denied*, 358 So. 2d 135 (Fla. 1978); Helton v. United Press Int'l, 303 So. 2d 650, 651 (Fla. 1st D.C.A. 1974).

132. Karp v. Miami Herald Publ. Co., 359 So. 2d 580, 581 n.1 (Fla. 3d D.C.A. 1978).

133. The trial and district courts relied on the Florida supreme court's decision in Firestone v. Time, Inc., 305 So. 2d 172 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976). A second reason why the lower courts' reliance on *Firestone II* was erroneous is that *Firestone* did not involve a matter of public concern. Therefore, even if a standard of fault had been determined in that decision, the standard may not have been applicable in *Karp*. *Karp* involved a newspaper article erroneously stating that the plaintiff was facing deportation after being

Therefore, Florida is without a definitive post-*Gertz* decision to establish what, if any, effect *Gertz* has had on Florida case law. The preceding analysis demonstrates Florida's pre-*Gertz*, voluntarily promulgated, qualified media privilege for matters of public concern. The following section juxtaposes Florida's historical posture with that of the states that have adopted a post-*Gertz* standard in an effort to identify Florida's position.

PROPOSED RESOLUTIONS FOR A POST-GERTZ FLORIDA

The doctrine announced in *Gertz* summoned the states to review two aspects of their defamation laws: damages and fault.[134] The actionable per se common law concept that presumed both general damages and malice is now foreclosed.[135] Although the *Gertz* Court delineated the boundaries of the damage issue by defining "actual injury,"[136] it left to the individual states the task of determining what standard of fault to apply to defamation suits brought by private plaintiffs.[137]

Unlike Florida, many states have now enunciated their post-*Gertz* stances. These states have adopted several divergent standards of fault, ranging from simple negligence to actual malice.[138] The considerations and rationales applied

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charged by immigration officials with illegal entry into the country. Actually, no charge had been filed, but an investigation was pending. Illegal entry may be determined to involve a matter of public concern. Thus, the precedential value of this district court decision is tenuous both because of its erroneous reliance on *Firestone* and because the parties agreed to a negligence standard without presenting appellate arguments on the issue.

134. The applicability of *Gertz* to non-media defendants is unclear. Although *Gertz* was phrased in terms of the media, 418 U.S. at 325, 347, 350, the Court has subsequently noted that this issue is unclear. Hutchinson v. Proxmire, 443 U.S. 111, 133-34 n.16 (1979). A few states have applied the *Gertz* principles to non-media defendants. *See, e.g.*, Artic Co. v. London Times Mirror, 4 Media L. Rep. 1947, 1950 (E.D. Va. 1978); Rogozinski v. Airstream By Angell, 152 N.J. Super. 133, 146, 377 A.2d 807, 814 (1977). *But see* Rowe v. Metz, 195 Colo. 424, 426, 579 P.2d 83, 84-85 (Colo. 1978); Retail Credit Co. v. Russell, 234 Ga. 765, 767-68, 218 S.E.2d 54, 56-57 (1975); Calero v. Del Chem. Corp., 68 Wis. 2d 487, 506, 228 N.W.2d 737, 748 (1975).

135. See note 10 *supra* and notes 120 & 127 and accompanying text, *supra*.

136. The Court's broad definition of "actual injury" has resulted in a lenient application of the damage issue in private person defamation suits. See note 127 *supra*.

137. See text accompanying note 120 *supra*.

138. *See, e.g.*, Ryder v. Time, Inc., 3 Media L. Rep. 1170 (D.D.C. 1977) (actual malice standard for matter of public or general concern); Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977) (simple negligence for private plaintiffs); Walker v. Colorado Springs Sun, Inc., 118 Colo. 86, 538 P.2d 450 (1975) (modified actual malice standard for matters of public interest), *cert. denied*, 423 U.S. 1025 (1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975) (simple negligence for private plaintiffs defamed by media defendants); Aafco Heating & Air Conditioning Co. v. Northwest Publ., Inc., 162 Ind. App. 671, 321 N.E. 580 (1975) (actual malice standard for matters of public concern), *cert denied*, 424 U.S. 913 (1976); Gobin v. Globe Publ. Co., 216 Kan. 223, 531 P.2d 76 (1975) (journalistic negligence for private plaintiffs); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (negligence standard for all private person defamation suits against media and non-media defendants); Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 266 N.W.2d 693 (1978) (per curiam) (actual malice standard for matters of public interest); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 596 (1975) (gross irresponsibility standard for matters of legitimate public concern); Taskett v. King Broadcasting Co., 86

by the states choosing an actual malice standard for publications about matters of public concern comports with the philosophy historically advocated by Florida law. A post-*Gertz* ratification of the actual malice standard for matters of public concern will serve simply to re-establish Florida's pre-*Rosenbloom*[139] and pre-*Gertz*[140] standard.

The Prospects of an Actual Malice Standard of Fault for Matters of Public Concern

In 1975, Indiana became the first state to reconcile *Gertz* with the qualified privilege announced in *New York Times* and *Rosenbloom*, adopting an actual malice standard of fault for publications involving matters of public interest.[141] The Indiana appellate court, in *Aafco Heating & Air Conditioning Co. v. Northwestern Publishing, Inc.*,[142] enunciated three dominant reasons for employing the actual malice standard. Initially, the court focused on its state constitution which provided for the right to publish on any subject whatsoever,[143] and on *New York Times*' and its progeny's commitment to robust debate on public issues.[144] This strong state and federal policy was deemed to mandate a standard of fault that accorded the communications media latitude for error while minimizing self-censorship on controversial public issues.[145] An actual malice standard was determined to be appropriate to protect the fundamental freedom of expression on public issues.[146]

Wash. 2d 439, 546 P.2d 81 (1976) (simple negligence standard). *See generally* Collins, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 2A CASE W. RES. L. REV. 306 (1978).

139. Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970), *cert. denied*, 410 U.S. 984 (1973). See notes 89-94 and accompanying text, *supra*.

140. Firestone v. Time, Inc., 271 So. 2d 745 (Fla. 1972), *rev'd on other grounds per curiam*, 305 So. 2d 172 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976). See notes 109-116 and accompanying text, *supra*.

141. Aafco Heating & Air Conditioning v. Northwestern Publ., Inc., 162 Ind. App. 671, 679, 321 N.E.2d 580, 586 (1975), *cert. denied*, 424 U.S. 913 (1976).

142. *Id.* at 671, 321 N.E.2d at 580. The newspaper published articles concerning an electrical home fire which resulted in the death of two children. The article revealed the plaintiff had installed a furnace in the home three weeks before the fire, no permit was obtained before the installation, and a fire official stated the furnace might have caused the fire. The district court sustained the trial court's summary judgment for the newspaper.

The post-*Gertz* decisions adopting a fault standard do not focus on the particular facts of the cases. Rather, the standard chosen was merely summarily applied to the facts.

143. *Id.* at 678 & n.4, 321 N.E.2d at 585-86 & n.4. Indiana's constitution provides: "No law shall be passed, restraining free interchange of thought and opinion, or restricting the right to speak, write or print, freely on any subject whatsoever; but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, §9.

144. *Id.* at 678-80, 321 N.E.2d at 586-87.

145. *Id.*

146. *Id.* at 678-85, 321 N.E.2d at 586-89. The uncertainty and vagueness of a negligence standard in the hands of the jury was determined to promote self-censorship by causing publishers to "steer far wider of the unlawful zone." *Id.* at 683, 321 N.E.2d at 588, *quoting from* Speiser v. Randall, 357 U.S. 513, 526 (1958). *See also* Cochran v. Indianapolis Newspaper, Inc., 372 N.E.2d. 1211, 1218 n.3 (Ind. App. 1978) (a different standard might have been adopted for private plaintiffs if *Aafco* had not been denied transfer by the Indiana supreme court and denied certiorari by the United States Supreme Court).

Second, the Indiana court noted the sizeable body of federal case law that had developed on the issue of distinguishing matters of public interest.[147] The court concluded that these precedents provided sufficient guidance for the judiciary and the media to determine which matters were appropriate for public comment. Therefore, the determination of which publications were protected by an actual malice standard would not invoke ad hoc judgments.[148]

Finally, the court in *Aafco Heating* adopted a subject matter focus due to its concern with the artificiality of and lack of constitutional predicate for a private-public person dichotomy. The underlying assumption of such a distinction, that society has a greater interest in protecting the reputation of the private rather than the public individual, was determined to erode the primary function of the first amendment. The court viewed the first amendment as an encouragement of commentaries on public issues.[149] Society's need to receive information on matters of public concern was deemed not diluted by the involvement of a private individual in the matter.[150] Therefore, a subject matter focus in the defamation litigation context was concluded to be consistent with the first amendment's and public's primary subject matter concern.

The rationales expressed in *Aafco Heating* for adopting an actual malice standard for matters of public interest are congruent with the policies expressed in prior Florida law. As in Indiana, Florida's constitution also protects the right to publish on any subject.[151] Moreover, Florida need not look to federal case law to discern a commitment to the discussion of matters of public concern. Florida's precedents provide a number of decisions which

147. 162 Ind. App. at 686, 321 N.E.2d at 590.

148. *Id.*

149. *Id.* at 680-81, 321 N.E.2d at 587. Access to the media to counter defamatory remarks was found to be a hardship encountered equally by private and public figures. The efficacy of any rebuttal was concluded to be dependent on the public's continuing interest in the event, rather than on the prominence of the actors. *Id.* Furthermore, the assumption that public individuals assume the risk of defamation due to their voluntary placement in the public's eye, was determined to be an unwarranted basis for distinguishing defamation suits. All citizens assume the risk of exposure by becoming involved in matters of public interest. *Id.* at 683, 321 N.E.2d at 588.

150. *Id.* at 680, 321 N.E.2d at 587. In determining the application of constitutional protections the focus must be on whether the publication concerns an issue of public interest, regardless of the individual's notoriety or anonymity. *Id.* The presence of a private individual in an event of public interest does not lessen the significance of the event. *Id.* at 682, 321 N.E.2d at 588. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) (a matter of public interest does not become less so when a private individual is involved) *and* Firestone v. Time, Inc., 271 So. 2d 745, 749 (Fla. 1972) (matters of public concern should be constitutionally protected whether notorious or obscure individuals are involved), *rev'd on other grounds per curiam*, 305 So. 2d 172 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976) *and* Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 475, 546 P.2d 81, 102 (1976) (Horowitz, J., dissenting) (the significance of an event of public interest is not altered by the presence of a private individual) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974) (public figures voluntarily expose themselves to an increased threat of defamation by becoming involved in public controversies).

151. Florida's constitution provides: "Every person may speak, write or publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." FLA. CONST. art. I, §4.

have consistently focused on the discussion of matters of public concern through the promotion of an uninhibited press.[152] *Ross v. Gore* is a succinct example of the Florida supreme court's recognition of the vital role of a free press in our society. By extending to the media latitude for occasional errors and abuse of its privileges, the Florida supreme court evinced a primary commitment to the uninhibited dissemination of news.[153] Recognition of the unique role of the media is also apparent in other early Florida decisions which refused to perpetuate strict liability in media-based defamation actions. Instead, the Florida courts developed a qualified privilege, requiring the plaintiff to affirmatively prove malice in cases involving media publications of public interest events.[154] The Florida supreme court has long and consistently applied a qualified media privilege to matters of public concern.[155] This judicial policy is the most cogent reason for predicting that *Gertz* will not alter the security of news dissemination on events that affect the lives of Florida citizens.

Indiana's additional reliance on the adequacy of federal case law for discerning matters of public interest illuminates the even greater efficacy of adopting a subject matter focus in Florida. For more than three decades the Florida courts have utilized a subject matter focus in conjunction with the media's qualified privilege.[156] The logical relationship test developed by the Florida supreme court in *Firestone v. Time* contributes certainty and simplicity to the judicial and media task of determining which publications are protected by an actual malice standard. Concededly, the *Firestone* test requires refinement. The test demands that a logical relationship exist between the event reported and the real concern of the public for a publication to have a qualified privilege.[157] However, "real concern of the public" has not been specifically defined, except by analogy to previous cases and hypothetical situations.[158] Nonetheless, the test lends more guidance to the courts and the media than merely stating that matters of public concern are protected by an actual malice standard. Moreover, the *Firestone* test can be expanded and refined. A significant benefit of the present test is that the court has held the logical relationship issue to be a question of law.[159] Reserving this decision for judges, rather than juries, will promote consistency and minimize decisions based on passion and prejudice. Furthermore, the Florida supreme court's focus on the public's genuine *concern*, rather than mere interest, with the subject matter,[160] serves to confine this qualified privilege to those

152. See note 39 *supra.*

153. 48 So. 2d 412, 415 (Fla. 1954). See text accompanying notes 48-50 & 55 *supra.*

154. See notes 41-42 and accompanying text, *supra.* The Florida legislature also embraced this philosophy of according special privileges to the media defendant in a defamation suit by promulgating civil and criminal statutes that mitigated the financial burden on the media. See notes 43-46 and accompanying text, *supra.*

155. See notes 39-40 and accompanying text, *supra.*

156. *See* Cooper v. Miami Herald Publ. Co., 159 Fla. 296, 301, 31 So. 2d 382, 384 (1947).

157. Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972), *rev'd on other grounds per curiam,* 305 So. 2d 172 (Fla. 1974), *rev'd,* 424 U.S. 448 (1976).

158. *Id.* at 749, 752.

159. *Id.* at 751. See note 113 and accompanying text, *supra.*

160. *Id.* at 748, 752.

publications which enhance the community's knowledge about significant public events. Utilized in this manner, the public concern focus can limit the applicability of the actual malice standard.

The Indiana court's recognition of the irrationality of distinguishing plaintiffs by their societal status has been previously understood and addressed by the Florida courts. Prior to the United States Supreme Court's rejection of a public-private individual dichotomy[161] the Florida supreme court renounced such a distinction in *Jacova*. *Jacova*'s refusal to base the media's qualified privilege to report events of public concern on the actor's desired anonymity[162] demonstrates Florida's early recognition that media privileges should not depend on the participant's status. Later, in *Firestone*, the Florida supreme court proclaimed that publications on matters of public concern should be protected regardless of whether notorious or obscure individuals happened to be involved.[163] Because Florida has developed a qualified media privilege that focuses on subject matter, the status of the plaintiff has necessarily received limited attention. This does not imply that the Florida courts are oblivious to the need to protect an individual's reputation from defamatory falsehoods. Rather, the subject matter focus indicates that Florida is concerned with preserving the reputation of both public and private figures, while also cognizant of the compelling need to secure news dissemination on public issues. This latter concern has promoted the recognition that the presence of a private individual in an event of public concern does not make the event any less significant to the public. The concerns which originally persuaded Florida to adopt an actual malice standard for matters of public concern are substantially the same concerns recognized by Indiana in *Aafco Heating*.

Only two other states that have adopted an actual malice standard for matters of public concern have explained their rationales.[164] The justifications offered by these state courts differ from those enunciated by the Indiana court. Nonetheless, their rationales are also consistent with Florida precedent.

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161. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 45-47 (1971); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

162. Jacova v. Southern Radio & Television Co., 83 So. 2d 34, 36 (Fla. 1955). See text accompanying notes 79-81 *supra*.

163. Firestone v. Time, Inc., 271 So. 2d at 749. *See also* Gibson v. Maloney, 231 So. 2d at 823-24 (relying on *Jacova*'s conclusion that a person emerges from his seclusion and is subject to depiction by the media when he becomes an actor in a matter of public interest).

164. Virginia has also adopted an actual malice standard for media reports on matters of public concern. Without explaining why this standard was adopted, the court granted summary judgment to a magazine publisher who had published an article about the attorney-client privilege and referred to a lawyer who had the same name as plaintiff. Ryder v. Time, Inc., 3 Media L. Rep. 1170 (D.D.C. 1977). New York developed a hybrid standard of "gross irresponsibility" for publications reasonably related to matters of legitimate public concern. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 200, 341 N.E.2d 569, 571 (1975). The Court of Appeals of New York affirmed summary judgment for the newspaper that had erroneously reported information about the arrest of a school teacher on drug related charges. *Id.* The court did not explain the precise limits or definition of gross irresponsibility. Nonetheless, it should be noted that New York has carved out a special standard of fault for media publications about "matters warranting public exposition." *Id.*

Colorado adopted an actual malice standard for matters of public concern based on the conclusion that a media deterred by a negligence standard would print insufficient facts in an effort to avoid libel suits.[165] This insufficiency was determined to be more harmful to the public than the possibility of inadequate compensation for the defamed private individual.[166] Correspondingly, in *Ross* the Florida supreme court determined that inhibiting the press' function of policing society through analytical criticism must be avoided to preserve a democracy dependent on the public's receipt of news.[167] Similarly, a Florida appellate court defined matters of public interest as events where the individual's right to receive damages for an injured reputation becomes secondary to the public's right to know.[168]

Michigan's adoption of an actual malice standard for media reports on matters of public interest[169] was premised on a retrospective analysis of state case law, which revealed that the qualified privilege was originally extended to communications in which a mutual subject matter interest existed between the communicating party and the recipient.[170] The duty to communicate had to be only of a social or moral character, rather than a legal obligation.[171] Florida's early case law similarly defined a qualified privilege as one in which there is a correspondence of interest in the subject matter, and privileged

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165. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 99, 538 P.2d 450, 457-58 (1975) (media publication about operators of an antique shop who purchased allegedly stolen goods), *cert. denied*, 423 U.S. 1025 (1976).

166. *Id.*

167. Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950). See text accompanying notes 49-50 *supra*.

168. Time, Inc. v. Firestone, 254 So. 2d 386, 388 (Fla. 4th D.C.A. 1971), *rev'd on other grounds*, 424 U.S. 448 (1976). An actual malice standard for matters of public interest encourages press coverage of vital topics that otherwise might be foreclosed by a negligence standard. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 442, 445 (1972). *See, e.g.*, Firestone v. Time, Inc., 460 F.2d 712 (5th Cir.) (techniques employed by private investigators), *cert. denied*, 409 U.S. 875 (1972); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) (quality of services rendered in a private business); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706 (9th Cir. 1968) (inaccuracies of mail order clinic lab testing), *cert. denied*, 394 U.S. 921 (1969); Gordon v. Random House, Inc., 349 F. Supp. 919 (E.D. Pa. 1972) (racial tensions), *vacated*, 511 F.2d 1393 (3d Cir. 1973); Goldman v. Time, Inc., 336 F. Supp. 133 (N.D. Cal 1971) (lifestyles of American teenagers). *See also* Firestone v. Time, Inc., 271 So. 2d 745, 748-49 (Fla. 1972) (public concern is not limited to governmental matters but includes activities that encourage general public involvement and matters relating to the health and comfort of the public).

169. Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 266 N.W.2d 693 (1978) (per curiam), involved a newspaper report and editorial about an attorney's allegedly inadequate representation of an indigent criminal defendant. A subsequent Michigan appellate court decision focused on a newspaper's negligence in placing a classified advertisement that referred to the appellant in an insulting manner. Pettengill v. Booth Newspapers, Inc., 88 Mich. App. 587, 590, 278 N.W.2d 682, 684 (1979). However, neither the majority nor dissenting opinions referred to *Peisner*, nor did the court assess whether the advertisement involved a matter of public interest. *Id.*

170. Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 161, 266 N.W.2d 699, 699 (1978) (per curiam), *quoting* Bacon v. Michigan Cent. R.R. Co., 66 Mich. 166, 170, 33 N.W. 181, 183 (1887).

171. *Id.*

these communications in the interest of society. However, no positive legal duty made them obligatory.[172]

The Michigan court then referred to a more recent line of decisions that had established an actual malice standard for media reports on matters of public interest.[173] Although most of the cases applying this privilege involved charges against public officials, the court determined that the social policy underlying these decisions extended to all media communications about matters of public concern.[174] Florida has explicitly extended this media privilege to matters of public concern, irrespective of the participant's status.[175] Although this privilege, secured by an actual malice standard of fault, was developed prior to *Gertz*, the legitimacy of the policy considerations it encompasses was not diluted by *Gertz*.[176] Furthermore, Florida's adoption of an actual malice standard in *Gibson*, before it was mandated by *Rosenbloom*, reinforces Florida's voluntary commitment to securing the dissemination of information to its citizens on matters of public concern.

The three post-*Gertz* state opinions that have articulated reasons for adopting an actual malice standard for matters of public concern can be profitably compared with Florida cases. The policy considerations enunciated by the Indiana and Colorado courts have been adopted and applied in prior Florida case law. Michigan's historical analysis reveals that Florida's case law developed in an analogous, yet more direct manner. Therefore, the previous Florida supreme court decisions would merely need to be affirmed for Florida to be aligned with these post-*Gertz* states.

Invading Florida Policy with a Negligence Standard

Prior to *Gertz*, the United States Supreme Court rejected the use of a reasonableness, or negligence, standard for defamation and privacy suits involving public matters. The primary reason was that the elusiveness of a negligence standard would afford neither adequate guidance for a jury nor the constitutional protection for speech and debate that is fundamental to our society.[177] Allowing the jury to determine the reasonableness of a

172. *See* Coogler v. Rhodes, 38 Fla. 240, 245, 21 So. 109, 112 (1896). See notes 27-28 and accompanying text, *supra*.

173. Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 161-63, 266 N.W.2d 699, 699-700 (1978) (per curiam).

174. *Id.*

175. *See* Firestone v. Time, Inc., 271 So. 2d 745, 749 (Fla. 1972), *rev'd on other grounds*, 305 So. 2d 172 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976); Nigro v. Miami Herald Publ. Co., 262 So. 2d 698, 700 (Fla. 3d D.C.A. 1972) (actual malice standard for newspaper articles about organized crime); Bishop v. Wometco Enterprises, Inc., 235 So. 2d 759, 761 (Fla. 3d D.C.A. 1970) (actual malice standard applied to television editorials about appellant's testimony before the city commission).

176. "In drawing the boundary for protected statements somewhere between negligent and reckless falsehoods, the [*Gertz*] Court did not decide that the social value of negligent falsehoods outweighs the conflicting social value of redressing injury to reputation, while the value of reckless falsehoods does not." Anderson, *supra* note 168, at 429.

177. Curtis Publ. Co. v. Butts, 388 U.S. 130, 163 (1967) (Warren, C. J., concurring, joined by Black, Brennan, Douglas, and White, JJ.) (rejecting Justice Harlan's reasonableness standard).

publisher's actions in verifying every reference to a name or picture would create the intolerable burden of subjecting the media to indeterminate liability for inevitable negligent error.[178] Self-censorship, and ultimately frustration of the public's need to know about public affairs, were deemed to outweigh the possibility of inadequate compensation for defamed individuals.[179]

Nevertheless, following the *Gertz* retreat, several states adopted a negligence standard for all private individuals. Four dominant reasons have been advanced by these states. However, juxtaposition of these rationales with prior Florida law reveals that they are not supported in Florida's legislative or judicial policies.

One of the expressed justifications for adopting a negligence standard was state constitutional law. For example, the Kansas[180] and Illinois[181] constitutions specifically enumerate reputation, life, and property as fundamental protected rights. Because injury to property was protected by a negligence standard, Kansas concluded that injury to reputation should be similarly protected.[182] Illinois determined that the state's constitutionally declared interest in an individual's reputation, unlike the federal counterpart, justified allowing private plaintiffs to recover for negligent injury to their reputations.[183] Florida, however, does not constitutionally recognize the

178. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). *See also* Time, Inc. v. Pape, 401 U.S. 279, 291 (1971) (actual malice standard gives the publisher assurance that inevitable errors will not subject him to indeterminate liability); St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968) (neither the defense of truth nor a reasonable care standard can protect the public's stake in public matters); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (a negligence standard creates the danger that legitimate publications will be penalized).

179. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971) (an erroneous verdict in a libel suit creates a strong impetus for self-censorship).

180. Gobin v. Globe Publ. Co., 216 Kan. 223, 531 P.2d 76 (1975). A newspaper article erroneously stated that the plaintiff had plead guilty to a charge of cruelty to animals. The court ultimately adopted a journalistic negligence standard for reports of judicial proceedings. *Id.* at 233, 531 P.2d at 85.

181. Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975) (newspaper published a photograph of plaintiff's house with an article about the suburban area criminal activities of youth gangs, implying a gang leader lived in the house and the house served as the gang's headquarters).

182. Gobin v. Globe Publ. Co., 216 Kan. 223, 232, 531 P.2d 76, 83 (1975). The Kansas constitution provides: "All persons, for injury suffered in person, reputation or property, shall have remedy by due course of law. . . ." KAN. CONST. B. of R. §18.

183. Troman v. Wood, 62 Ill. 2d 184, 193-95, 340 N.E.2d 292, 297-98 (1975). The Illinois constitution states: "[E]njoying and defending life and liberty; acquiring, possessing and protecting property and reputation" are fundamental rights. ILL. CONST. art. I, §12. The court rejected a journalistic negligence standard because it would make the prevailing practices in the community controlling. Therefore, if the community had only one newspaper, it could establish the standard. 62 Ill. 2d at 196-98, 340 N.E.2d at 298-99. *But cf.* Anderson, *supra* note 107, at 21 (May 1979) (professional negligence can be applied to journalism in the same way it has been applied to other professions). In medical malpractice suits in Florida the defendant is entitled to introduce expert testimony of competent practitioners from his same medical specialty. Foster v. Thorton, 125 Fla. 699, 706, 170 So. 459, 463 (1936). Furthermore, the locality rule has been expanded to allow expert witnesses to be from

protection of reputation as a basic right.[184] Therefore, there is no state constitutional basis in Florida for permitting private individuals to receive compensation for harm to their reputations under a negligence standard.

A second justification for the adoption of a negligence standard has been the lack of prior state law requiring a higher standard for private plaintiffs.[185] Florida, however, has a long and consistent history of affording a qualified privilege to all matters of public concern, irrespective of the plaintiff's status. Secured at first by an express malice standard,[186] and later by an actual malice standard,[187] the Florida courts have demonstrated a specific, voluntary[188] commitment to the protection of publications concerning public matters.

Another reason expressed in support of a negligence standard for private individuals is the concern that a distinction based on whether the publication involved a matter of public concern would require ad hoc judicial determinations.[189] Because Florida already has an extensive and increasingly

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the same or similar locality, not just the same locality. Montgomery v. Stary, 84 So. 2d 34, 39 (Fla. 1955).

184. The Florida constitution provides that one's inalienable rights are "the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property." FLA. CONST. art. I, §2.

185. In Cahil v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975), the Hawaii supreme court focused on the fact that its state law prior to *Rosenbloom* had determined that negligence was the proper standard for private plaintiffs. *Id.* at 533, 534 P.2d at 1363. In *Cahil* a radio broadcast, discussing the plaintiff's opposition to the mayor's stiff criminal sentences, implied that plaintiff and his family were disloyal to their country and were Communist sympathizers. In Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976), the Washington supreme court relied on the fact that prior to *New York Times* malice was not an element in its state civil libel law. The change in state law was determined to have occurred only because of the Supreme Court's mandates. Thus it was found to be consistent with state law to return to a stricter liability standard. *Id.* at 444-45, 569 P.2d at 84. *Taskett* involved a business executive who had filed for dissolution of his corporation and went on vacation, forgetting to pay his corporation's office rent. A television station reported that he had fraudulently used corporate funds and implied that he left town to defraud his creditors.

186. See notes 29, 40-42 and accompanying text, *supra.*

187. See notes 90-95, 109-110 and accompanying text, *supra.*

188. See note 40 *supra.*

189. *See* Cahil v. Hawaiian Paradise Corp., 56 Haw. 522, 536, 543 P.2d 1356, 1366 (1975); Troman v. Wood, 62 Ill. 2d 184, 194-95, 340 N.E.2d 292, 297-98 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85, 91 (Okla. 1976).

The conclusion that a subject matter focus will invoke ad hoc determinations is diluted in light of post-*Gertz* decisions which have recognized a dual standard for private and public defamation suits. For instance, in Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859 (5th Cir. 1978), a magazine had published an article which mentioned plaintiff's name in association with a group of Chicago mobsters. The lower court summarily concluded that *Gertz* established a negligence standard for private plaintiffs. 411 F. Supp. 440 (S.D. Ga. 1976). However, the district court determined that the appellant was a public figure due to his voluntary contacts with the subject matter of the article. *Id.* at 445. The court noted that defining public figures is "like trying to nail a jelly fish to the wall." *Id.* at 443. The Fifth Circuit Court of Appeals affirmed the summary judgment for the magazine. Without concluding that a negligence standard would not apply to private individuals, the court stated: "The nature of his reported associations and activities concerning organized crime, are, without dispute, subjects of legitimate public concern." 580 F.2d at 861. The court concluded that an actual malice standard should be applied to a publication involving a "public

well-defined array of case law on this issue, adopting a negligence standard would create the converse problem. A new doctrine of defamation law would have to be developed in order to implement such a revised system. Several commentators have suggested that the existing negligence law, which was developed for physical torts, could not simply be converted into use with the law of defamation, since the principles applied in defamation suits involving public issues must incorporate the first amendment protections of free speech and press.[190] It is also feared that the flexibility of a negligence standard, with its broadly defined concept of reasonable care, would unjustly allow juries to impose their own personal standards of reasonable journalism.[191] For this reason the Florida supreme court[192] delegated to judges the task of determining whether or not a particular publication involved a

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controversy of legitimate public concern." *Id.* at 862. The court seems to have broadened the public figure category by utilizing a subject matter focus. This may be a popular method of circumventing a state's adoption of a negligence standard.

190. Negligence in defamation cases will have to be defined more specifically than it is defined for physical tort cases in order to preserve a minimum breathing space. Anderson, *supra* note 168, at 461. Since negligence law is made ex post facto and ad hoc, precedent has minimal influence. Green, *The Duty to Give Accurate Information,* 12 U.C.L.A. L. REV. 464, 470-71 (1965). Tort theory and speech theory cannot be unified. There is no place for the reasonably prudent man in the first amendment spectrum. Kalven, *supra* note 21, at 302, 303. *See also* Frakt, *supra* note 107, at 495 (a negligence standard would be unduly harsh on the press).

191. *See* Anderson, *supra* note 18, at 276-79. *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 366 (1974) (Brennan, J., dissenting) (a reasonable care standard will require publishers to guess how a jury will later assess the divergent conditions of the newsgathering system).

A journalistic negligence standard, as opposed to a simple negligence standard, will mitigate the potential for judges and juries to impose their personal journalistic preferences. This standard would permit expert testimony on aspects of the publishing industry unfamiliar to lay persons. The reasonable man probably cannot assess the impact of wire services, electronic editing, computers and the tremendous time pressure on the publisher's actions. Therefore, expert witnesses from a comparable medium and school of journalism would aid the fact-finder in evaluating the reasonableness of the defendant-publisher's actions. *See* Anderson, *supra* note 107, at 20-21 (May, 1978). *Cf.* Gobin v. Globe Publ. Co., 216 Kan. 223, 224, 541 P.2d 76, 84 (1975) (adopted a standard of fault of a reasonably careful publisher from a comparable community under similar circumstances). *But see* Troman v. Wood, 62 Ill. 2d 184, 196-98, 340 N.E.2d 292, 298-99 (1975) (rejected a journalistic negligence standard because practices of a single newspaper community could not be evaluated). *See also* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.,* 54 TEX. L. REV. 199, 259 n.2 (1976) (expert testimony would only be required in exceptional circumstances; a publisher's decisions are within the potential understanding of a jury).

Although a journalistic negligence standard may be a viable alternative to simple negligence for states inclined to distinguish defamation suits on the basis of the plaintiff's societal status, it is not a sufficient solution for Florida. A negligence standard would import a preponderance of the evidence standard of proof. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971). This standard of proof, as opposed to the clear and convincing standard used with actual malice, will increase the likelihood of erroneous verdicts for the plaintiff, and consequently self-censorship. *Id.*

192. Firestone v. Time, Inc., 271 So. 2d at 751. It should be recalled that *Gertz* was decided by a narrow majority. See note 118 *supra.* The Court may eventually return to the *Rosenbloom* perspective, or some other method that would promote consistency among the states.

matter of public concern.[193] Imposing a negligence standard would displace the judicially assigned role of securing protection for publications on public issues.

The final justification for the adoption of a negligence standard was the apparently limited access of private figures to channels of effective rebuttal and the comparatively lesser degree of voluntariness in their public exposure.[194] The public official's or public figure's ability to successfully counter defamatory statements may be more tenuous than presumed by these courts. The public official and public figure categories include persons who hold nominally influential positions, and thus cannot easily command the public's attention.[195] The effectiveness of any rebuttal depends on the defamed individual's ability to reach and persuade the same audience that received the defamatory publication.[196] The publisher's audience may be as inaccessible to these peripheral public officials and public figures as it is to non-public figures. The opportunity to rebut effectively also depends on the public's continued interest in the event.[197] Admittedly, some public figures may be able to sustain the public's interest even if the event is short-lived. Inclusion in the public official and public figure categories of persons who do not assume prominent positions in the public's attention, however, reduces the accuracy of the generalization that public persons can more effectively rebut defamatory statements.[198] The Florida statutory provisions for defamation actions against media defendants provide an incentive for the publisher to voluntarily retract or correct by precluding the recovery of punitive damages.[199] The Florida legislature has thus attempted to promote an effective means for defamed public or private individuals to reach the publisher's audience. This legisla-

193. *See, e.g.*, Stone v. Essex County Newspapers, Inc., 376 Mass. 849, 859, 330 N.E.2d 161, 168 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85, 90-91 (Okla. 1976); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977).

In *Stone* a reporter misinterpreted an arraignment for drug possession and erroneously identified the appellant as the accused. A news editor who knew the appellant was surprised when he read the report, but printed the story without further confirmation. 376 Mass. at 849, 330 N.E.2d at 161. In *Martin* a newscaster broadcast false reports about a pet shop owner and his alleged mistreatment of animals. 549 P.2d at 85. In *Foster* a newspaper article implied that the private activities of an elected county surveyor involved a conflict of interest. Although the appellant was found to be a public official, the statements in question were concluded not to be related to his official conduct. 541 S.W.2d at 814.

194. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 85, 89 (1966) (a former county recreational supervisor may be a public official if he appears to the public to have control over or substantial responsibility for governmental affairs) (Douglas, J., concurring) (there is no reason to "draw lines to exclude the night watchman, the file clerk, the typist, or for that matter, anyone on the public payroll."); Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861 (5th Cir. 1978) (a person allegedly associated with mobsters is a public figure because organized crime is a subject of public concern).

195. *See* Note, *Vindication of The Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1746 (1967).

196. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971).

197. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974).

198. See note 46 *supra*.

199. See notes 48-51 and accompanying text, *supra*.

tion reduces the disparity between the public and private individual's ability to counter defamatory statements.

The final justification for adoption of a negligence standard is voluntariness, and is also uncorroborated in Florida law. Judicial concerns about the free flow of information[200] have necessarily precluded distinguishing publications by the manner in which the participants enlisted in the event. In *Jacova* the Florida supreme court specifically refused to limit the media's qualified privilege to report events of public interest on the basis of whether the actor's exposure to the public was voluntary.[201] The Florida supreme court's determined focus on adequate protection for dissemination of news involving matters of public concern seems to have decisively distinguished Florida from those states that have adopted a negligence standard for private figure defamation suits.

CONCLUSION

Pragmatically, a perfect balance cannot be achieved through the adoption of any standard of fault to govern defamation litigation. If a negligence standard is utilized for matters of public concern, self-censorship and foreclosure of information to the public will result. Conversely, an actual malice standard will provide greater breathing space for the media and thus the receipt of more varied and more complete news by the public. However, this standard also creates the potential that the plaintiff will not be able to prove knowing or reckless disregard although the statement is both defamatory and false. Injury to the plaintiff's reputation may have resulted, yet there is no means by which to vindicate this injury.

Remedies must be developed that will aid the falsely defamed person in vindicating his reputation. Plaintiffs unable to prove the requisite fault of the publisher should be able to obtain a declaratory judgment or a special verdict on the issue of falsity.[202] Consensual right of reply statutes, although somewhat restricted by constitutional limitations,[203] might be promulgated in an effort to satisfy the defamed individual's need to answer defamatory charges.[204] Remedies should also provide incentives for the media to produce accurate, yet comprehensive reporting. Summary judgments ought to be freely granted if the plaintiff fails affirmatively to establish the false and defamatory

200. Jacova v. Southern Radio & Television Co., 83 So. 2d 34, 36 (Fla. 1955). *Jacova* was subsequently relied upon in *Gibson* where an actual malice standard was promulgated for matters of public interest. Gibson v. Maloney, 231 So. 2d 823, 825-26 (Fla. 1970).

201. *See* RESTATEMENT (SECOND) OF TORTS §23, Special Note on Remedies for Defamation Other than Damages (1976).

202. In Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241 (1974), the Supreme Court held that Florida's mandatory right to reply statute for media defamed public office candidates was unconstitutional. The Court focused on the mandatory language of the statute. *Id.* at 254. Perhaps a retraction statute could be framed in a consensual, rather than mandatory, manner. For instance, publication of the defamed party's reply or a mutually stipulated retraction could be used as evidence in a subsequent defamation suit to limit recovery to special damages. Thus, the retraction would serve as both an incentive to the publisher and a vindication for the defamed party.

203. *See* Note, *supra* note 195, at 1739-49.

character of the publication. Retractions, corrections or apologies that appear complete should not only preclude recovery of punitive damages, but also be admitted as evidence of the publisher's sincerity and desire to mitigate the effect of defamatory statements. Solutions promulgated along these lines would not require Florida to retreat from its commitment to promoting an informed society through the uninhibited receipt of news about matters of genuine public concern. These types of remedies may be employed to supplement the policies that have already been developed in Florida law.

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